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IN THE

Supreme Court of the United States

No. 75-979

Term
October, 1975

LEVA ADKINS, ADMINISTRATRIX OF THE ESTATE OF EVERETT HARMON ADKINS, DECEASED,
PETITIONER,

- v -

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R.V. LOFTUS,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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RESPONDENTS.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Leva Adkins, Administratrix of the Estate of Everett Harmon Adkins, Deceased, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this proceeding on October 14, 1975.

OPINIONS BELOW

The Opinion of the Appellate Court of Illinois, Third Judicial District, affirming the judgment of the trial court is reported at 2 Ill. App. 3d. 906, 274 N.E. 2d 507 (1971).

The opinion of the Supreme Court of Illinois, reversing the decision of the Appellate Court of Illinois and the judgment of the Circuit Court for Rock Island County is reported at 54 Ill. 2d 511, 301 N.E. 2d 729 (1973).

A copy of each appears in the Appendix hereto.

Collateral litigation which bears upon the questions presented in the instant petition in the United States District Court for the Northern District of Illinois is reported *sub nomine, Adkins v. Honorable Robert C. Underwood,* 370 F. Supp. 510 (N.D. Ill. 1974), *affirmed,* 520 F. 2d 890 (7th Cir. 1975) *(per curiam), cert. denied,* No. 75-572 (December 8, 1975).

A copy of each also appears in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1257 (3). On June 4, 1973, the Supreme Court of Illinois issued its opinion in the case at bar. On October 5, 1973, Petitioner, as Plaintiff in the United States District Court for the Northern District of Illinois, sought to enjoin and restrain the Justices of the Supreme Court of Illinois from rendering final judgment in this cause. On October 26, 1973, the District Court entered an Order pursuant to Stipulation, precluding the entry of judgment until the final determination of threshhold jurisdictional questions. On January 16, 1974, the District Court entered an Order of dismissal which was affirmed by the United States Court of Appeals for the Seventh Circuit on July 17, 1975. This Court denied a petition for writ of certiorari addressed to the Seventh Circuit on December 8, 1975.

The mandate of the Supreme Court of Illinois dated October 10, 1973, was then entered on October 14, 1975, and this petition for certiorari was filed within ninety (90) days of that date.

QUESTIONS PRESENTED

THIS APPLICATION INVOLVES A CIVIL SUIT FOR DAMAGES BY A MICHIGAN CITIZEN AGAINST THREE ILLINOIS DEFENDANTS, TWO OF WHOM CANNOT BE SUED ELSEWHERE AND, WHO HAD NEVER PRIOR TO A

JURY VERDICT OF $449,757.00, EITHER MOVED TO DISMISS FOR *FORUM NON CONVENIENS* NOR CONSENTED TO BE SUED ELSEWHERE AND A SPLIT DECISION REVERSAL OF THAT JURY VERDICT BY THE ILLINOIS SUPREME COURT BASED SOLELY UPON THE CLAIM THAT ILLINOIS WAS NOT A CONVENIENT FORUM AND WITHOUT A HEARING ON THE ISSUE.

I.

IS IT NOT VIOLATIVE OF FEDERAL CONSTITUTIONAL GUARANTEES AND PRINCIPLES OF PROCEDURAL DUE PROCESS ESTABLISHED BY THIS COURT FOR ILLINOIS TO BAR PLAINTIFF FROM SUING IN ILLINOIS WHEN:

A. PLAINTIFFS NEVER HAD A HEARING ON THE ISSUE OF *FORUM NON CONVENIENS*,

B. THE ILLINOIS SUPREME COURT ATTACHED PREJUDICE TO AN EARLIER FEDERAL DISTRICT COURT'S ORDER OF DISMISSAL WITHOUT PREJUDICE,

C. PLAINTIFF WAS FOUND, WITHOUT A HEARING, NOT TO BE IN SOME NEBULOUS KIND OF "GOOD FATH" IN SUING TWO ILLINOIS DEFENDANTS AGAINST WHOM THE JURY, THE TRIAL JUDGE AND THE UNANIMOUS INTERMEDIATE APPELLATE COURT ALL FOUND SUFFICIENT (IF NOT OVERWHELMING) EVIDENCE FOR LIABILITY.

D. WHILE PLAINTIFF, BY APPLICATION FOR REHEARING TO THE ILLINOIS SUPREME COURT, POINTED OUT THE CONSTITUTIONAL INFIRMITIES, THE COURT DENIED ANY HEARING ON THE CONSTITUTIONAL CHALLENGE.

AND CIVIL JURY TRIALS AND *FORUM NON CONVENIENS* HEARINGS ARE GRANTED TO ILLINOIS CITIZENS SUING ILLINOIS DEFENDANTS?

II.

DOES NOT THE DECISION OF THE ILLINOIS SUPREME COURT TO GRANT IMMUNITY FROM SUIT TO ITS CITIZENS WHO CANNOT BE SUED IN ANY OTHER STATE CONTRAVENE FEDERAL CONSTITUTIONAL GUARANTEES AND THE PRINCIPLES RELATING TO *FORUM NON CONVENIENS* INCLUDING THE ESSENTIAL PREREQUISITE OF AN AVAILABLE ALTERNATIVE FORUM

ESTABLISHED BY THIS COURT IN *GULF OIL CORP V. GILBERT*, 330 U.S. 501 (1947)?

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Constitution of the United States apply hereto:

> The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
> U.S. Constitution, Art. IV., § 2.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> U. S. Constitution, Amendment XIV.

STATEMENT OF THE CASE

1. *The Original Cause of Action*

On the night of October 6, 1966, Petitioner's Decedent, Everett Harmon Adkins, an experienced, professional, over-the-road, semi-truck operator, was killed while en route from Detroit to Los Angeles, when the truck he was operating was struck by a Chicago, Rock Island & Pacific Railroad train at an unguarded, Main Street crossing in Booneville, Iowa.

2. *Proceedings in the Southern District of Iowa*

Petitioner first brought suit on October 18, 1966, in the United States District Court for the Southern District of Iowa against the Chicago, Rock Island & Pacific Railroad Company, only. Extensive discovery was undertaken by both parties to that action and during the course of pretrial proceedings it was agreed by *both* parties that the suit should be discontinued. On November 9, 1967, the Court approved a Rule 41(a) (2)[1] dismissal without

[1] Rule 41 (a) (2) of the Federal Rules of Civil Procedure reads in its entirety as follows:

> (2) *By Order of the Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

prejudice.

3. *Proceedings in Rock Island County Circuit Court*

Petitioner refiled against the Respondent Railroad in the Circuit Court for Rock Island County, Illinois, on January 16, 1968, and was subsequently granted leave by that Court to add the Respondents, Throckmorton and Loftus, on May 14, 1968, at a point well within the statute of limitations.

During the pretrial proceedings in Rock Island County Circuit Court, the Respondent Railroad, *only*, moved the Court for an order declining jurisdiction on the ground of *forum non conveniens*. But, because at that point, with the addition of the two individually named Respondents, Throckmorton and Loftus, who were citizens and residents of Illinois and who could only be sued in Illinois, who were charged with acts of negligence committed in Illinois, and who never, in any way consented or indicated they would consent, to be sued in any other State than Illinois, the case was not in a posture for hearing on the issue of convenience, *no hearing was held* and the trial court denied the Motion on August 12, 1968.

At trial, the jury returned a verdict against all three of the Defendants in the amount of $449,757.00. The Defendants then moved the trial court for judgment *non obstante verdicto* and the two individually named Respondents *for the first time raised the issue of forum non conveniens*. The trial court denied this motion as well and the Respondents appealed.

4. *Proceedings in the Appellate Court of Illinois*

The Respondents prosecuted an appeal, as of right, to the Appellate Court of Illinois, Third Judicial District, in which they raised a number of issues, including, *inter alia*, the denial of the pretrial motion with respect to *forum non conveniens*. The Appellate Court of Illinois unanimously affirmed the trial court on all of the issues raised, but ordered a remittur in the amount of $199,757.00. The Respondents then sought leave to appeal to the Supreme Court of Illinois.

With respect to the issue of *forum non conveniens*, a unanimous Court emphasized:

> After an examination of the record in the case now before us on appeal we can only conclude that prior to verdict there was never available a choice of forum, since Illinois was the only state in which all three defendants could be sued. At no time did the individual defendants Throckmorton and Loftus consent or in any way indicate that they would consent to be

sued in any state other than Illinois, their state of citizenship and residence. It is significant that the defendants Throckmorton and Loftus never raised the issue of *forum non conveniens* at any time prior to verdict. In fact, there was never any claim, affidavit or motion prior to trial in which the individual defendants Throckmorton and Loftus contended that the complaint against them should be dismissed or that the pending action should be heard by a forum other than the circuit court of Rock Island County.

5. *Proceedings in the Supreme Court of Illinois*

The Illinois Supreme Court granted the Respondents' petition for leave to appeal. Again, the Respondents raised a variety of issues, some nine assignments of error, including, *inter alia*, the trial court's decision of the *forum non conveniens* question. The Supreme Court of Illinois, one Justice dissenting, reversed and remanded with directions to dismiss Petitioner's suit with prejudice. That Court considered only the issue of *forum non conveniens*.

The crux of the Illinois Supreme Court's decision was its characterization of the discontinuance in the United States District Court for the Southern District of Iowa as "unseemly business" which it attributed to "the plaintiff who was dissatisfied with pretrial rulings of the Iowa judge concerning the admissibility of certain evidence." With respect to the joinder of the Respondents, Throckmorton and Loftus, the Court held: "[W]e are not convinced that the individual defendants were joined with probable cause and in good faith for the purpose of obtaining a judgment against them." *Adkins, supra*, 54 Ill. 2d at 515-516, 301 N.E. 2d at 731.

In a lengthy and vigorous dissent by Mr. Justice Goldenhersh in which he joined the trial judge and the three judges of the Appellate Court of Illinois, it was pointed out that the majority opinion rested upon factual assumptions not warranted by the record, arbitrarily attributed improper conduct to the Petitioner, and misapplied this Court's benchmark in *Gulf Oil Corp. v Gilbert*, 330 U.S. 501 (1947), in order to effect "a miscarriage of justice." *Adkins, supra*, 54 Ill. 2d at 515-516, 301 N.E. 2d at 731.

6. *Proceedings in the Northern District of Illinois*

Although the Petitioner, by a timely petition for rehearing, sought consideration in the Illinois Supreme Court of the Constitutional impact of its decision, that Court refused to give such consideration on September 23, 1972, without opinion. Petitioner then immediately sought redress in the United States District Court

for the Northern District of Illinois, invoking 42 USC § 1983, and praying for declaratory and injunctive relief against the Justices of the Illinois Supreme Court and the two judges of the Rock Island County Circuit Court. On October 26, 1973, the District Court entered an order, by Stipulation, between the Petitioner, as Plaintiff, and the Justices of the Illinois Supreme Court, as Defendants, which precluded the entry of final judgment in Illinois, until the final determination of the civil rights action. On January 16, 1974, the District Court granted a Rule 12(b)(6)[2] Motion To Dismiss, relying on the doctrine of judicial immunity (even though only equitable relief was sought) and holding that the "federal courts and the federal civil rights acts do not guarantee a citizen against the loss of a private civil action due to alleged irregularities such as in the instant action in the state court trial and appeal . . . " *Adkins v. Honorable Robert C. Underwood, supra,* 370 F. Supp. at 514.

7. *Proceedings in the Seventh Circuit*

The Petitioner then filed an appeal from the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit. That Court affirmed, but relied on principles of comity and held that for Petitioner, as Plaintiff, to make good her civil rights action, it would be necessary to allege a "purposeful conspiracy," or that the "proceedings were a sham or that the justices invidiously used their office to deprive plaintiff of her rights." *Adkins v Honorable Robert C. Underwood, supra,* 520 F. 2d at ____.

8. *Proceedings in the United States Supreme Court*

This Court denied certiorari in the civil rights action in No. 75-572, earlier this Term, on December 8, 1975.

9. *Proceedings After the Determination of the § 1983 Claim*

Following the affirmance by the Seventh Circuit U.S. Court of Appeals, and while the Petition for Certiorari was pending in

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[2]Rule 12 (b) (6) of the Federal Rules of Civil Procedure reads in pertinent part as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . .
>
> * * *
>
> (6) failure to state a claim upon which relief may be granted . . .

No. 75-572, the mandate of the Supreme Court of Illinois rendering final judgment in the instant case was entered on October 14, 1975.

10. *Present Status of the Case Sub Judice*

At present, the Petitioner has completely lost her right of action against the two individually named Respondents although she had brought suit against them in a timely manner and tried the suit to judgment. She will also be forced to file a new lawsuit against the Respondent Railroad and relitigate the entire case with considerable additional expense and difficulty in Iowa and with the risk of ultimately completely losing that case as well.

REASONS FOR GRANTING THE WRIT

I

PETITIONER HAS NOT BEEN ACCORDED THE SAME RIGHT OF ACCESS TO ILLINOIS COURTS AS IS ACCORDED ILLINOIS CITIZENS.

The crux of the dissent in the Illinois Supreme Court was the recognition that:

> As stated by the appellate court the applicability of the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process." (2 Ill. App. 3d 906,912). The record fully supports the appellate court's statement "that prior to verdict there was never available a choice of forum, since Illinois was the only state in which all three defendants could be sued. At no time did the [sic] individual defendants Throckmorton and Loftus consent or in any way indicate that they would consent to be sued in any state other than Illinois, their state of citizenship and residence. It is significant that the defendants Throckmorton and Loftus never raised the issue of *forum non conveniens* at any time prior to trial in which the individual defendants Throckmorton and Loftus contended that the complaint against them should be dismissed or that the pending action should be heard by a forum other than the circuit court of Rock Island County." 2 Ill. App. 3d 906, 912. (Appendix A)

The unanimous opinion of the intermediate appellate Court goes on to explain:

> The exercise of discretion by a trial court cannot be abused when in fact the court was not vested with the power or right

of discretion. In the case before us the trial court did not have presented to it a second forum which would be available to all defendants so we fail to see any error in the court's refusal to grant the motion for dismissal based upon the doctrine for *forum non conveniens.* (Appendix B)

Petitioner has no forum other than Illinois Courts in which to sue Illinois citizens Throckmorton and Loftus. By dismissing her action, not on the merits but on the basis of *forum non conveniens,* the Illinois Supreme Court has effectively shielded those Illinois citizens from any adjudication as to their liability on Petitioner's claim.

The United States Constitution ensures to all citizens a right of access to the courts of each state on an equal footing with citizens of that state:

> The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. U.S. Const. Art. IV, §2.

The proposition that the Privileges and Immunities Clause prohibits a State from limiting use of its courts to its own citizens is a long-standing and elementary principle. *Blake v McClung,* 172, U.S. 239 (1898).

The Illinois Constitution provides for citizens of the State of Illinois an absolute guarantee of the right to obtain judicial redress from tortfeasors:

> §12. *Right to Remedy and Justice*
> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.
> Ill. Const. Art. I, §12

Illinois statutes also make Illinois courts available to Illinois citizens who have been harmed by citizens of other States. cf: 110 Ill. Rev. Stat. §17. Petitioner, however, has been denied, without any adjudication on the merits, the right to sue two Illinois citizens. This denial of any right of redress is done, not even in the name of jurisdiction, but solely on the basis of purported "convenience."

The power of the State court to determine what causes of actions it will or will not adjudicate is clearly limited by obligations imposed by the Federal Constitution.

> The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall

be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states, substantially the same right of access to its courts as it accords to its own citizens.
McKnett v St. Louis & S.F. Railway Co., 292 U.S. 230 (1934) at 233

The Illinois law applicable to a claim of *forum non conveniens* is stated by the Illinois Supreme Court in its decision in this case. That law (presumably applied to Illinois citizens) requires the existence of "another forum that can better 'serve the convenience of the parties and the ends of justice'."

Indeed, the availability of more than one forum for litigation is the very basis of the doctrine. This Court has explicitly established that criterion as the *only* basis on which consideration of a claim of inconvenience may be based:

> In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.
> *Gulf Oil Corp v Gilvert*, 330 U.S. 501, 506 - 7 (1947)

The action of the Illinois Supreme Court totally disregards that requirement and ignores the unconscionable Constitutional deprivation which is permitted thereby.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT CONSTITUTES A GROSS DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS

1. The ruling of the Illinois Supreme Court, if allowed to stand, would deny to Petitioner due process of law which is guaranteed to her by the Constitutions of the United States and the State of Illinois in that:

a. Petitioner *has never had a hearing in any court on the issue of forum non conveniens or whether there was an alternate forum in which each defendant was amenable to process.* A second forum is a mandatory prerequisite for the lower court to have proceeded with a hearing on either the convenience of the forum or whether or not the causes of action alleged against the Respondents were in good faith. The ruling of the Court below punishes Petitioner for Respondents' gross procedural mistakes which effectively precluded

a lower court hearing. It cannot be said that simply because Respondents would be found to have waived their right to a hearing, that Petitioner has also waived a full hearing.

b. Petitioner *has never had a hearing in any court on the issue of whether or not Illinois was a convenient forum* simply because the Respondents' pleadings and conduct was such as to never allow that issue to be reached.

c. Petitioner acted in the utmost good faith by attempting to pursue her legal remedies and get a fair trial. The Illinois Supreme Court has found her lacking in good faith when she *has never had a hearing in any court on her good faith* simply because the defendants' pleadings and conduct was such as to never allow that issue to be reached. Petitioner respectfully submits that she cannot be found lacking in good faith as a matter of law without a hearing.

The Fourteenth Amendment to the United States Constitution guarantees to all citizens that:

> No State shall deprive any person of life, liberty, or property, without due process of law . . .

This Court has held, time after time, that the due process guarantee requires two basic elements for fair adjudication: notice and a hearing. *Baldwin v Hale*, 68 U.S. 223 (1863); *Baltimore and O.R. Co. v United States*, 298 U.S. 349 (1936), *Goldberg v Kelly*, 397 U.S. 254 (1970). The repeated reaffirmation of that principle has made it axiomatic that any court must afford a litigant an opportunity to present his case before the court can decide that case.

> The due process clause assures a *full hearing* before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based on it. *Baltimore & O R Co v United States*, *supra*, at 368-69. (emphasis added)

The Illinois Supreme Court has ordered plaintiff's cause of action dismissed on the basis of two factual conclusions:

(1) "Rock Island County is not an appropriate forum for the trial of this case."

(2) "We are not convinced that the individual defendants were joined with probable cause and in good faith for the purpose of obtaining a judgment against them."

The first of these conclusions is drawn without any hearing ever being held by any court on that question. The trial court, affirmed by the Illinois Court of Appeals, disposed of the question of *forum non conveniens* when it was raised on the simple (and

proper) ground that the absence of an alternative forum precluded the Court from ever considering application of the doctrine. The Illinois Suppreme Court, however, after delineating a series of factual questions which must be decided in order to apply the doctrine, then proceeded to adjudicate the case without allowing Petitioner any opportunity to present evidence on any of these factual questions, admittedly necessary to adjudication.

Similarly, the Court found Petitioner's claim against the two individual defendants to have been filed in bad faith. This finding is made in spite of the fact that such an issue was never posed by the defendants and was never the subject of any hearing before any court. The very fact that both the trial court and the Illinois Court of Appeals held those parties liable should indicate that plaintiff had at least a colorable claim against them. However, Plaintiff does not need to reply solely on that circumstance, and, if granted a hearing, can prove to the satisfaction of any court her good faith in the joinder of those parties.

The crucial point here is the proviso: *"if granted a hearing."* Without any opportunity to defend, plaintiff has been accused, tried and adjudged guilty of bad faith by an appellate court. At no place in the record on which that judgment was made is there a showing that plaintiff had an opportunity to contest such a charge. While general principles of estoppel and waiver should have prevented those issues from being raised at this late date, 3 Am Jur; *Appeal and Error* § 246, it is clear that, as an absolute minimum, plaintiff is entitled to a hearing on the factual questions of her alleged "bad faith" and the alleged "inconvenience" of the Illinois forum.

RELIEF SOUGHT

The Petitioner respectfully prays that a Writ of Certiorari to the Supreme Court of Illinois shall issue and that this Court shall reverse the judgment and order of that Court with directions to hold a full evidentiary hearing on the issue of *forum non conveniens*.

Respectfully submitted.

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DATED: Detroit, Michigan
January 12, 1976

APPENDICES

(No. 44876.—Reversed and remanded.)

LEVA ADKINS, Admr., Appellee, v. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY *et al.*, Appellants.

Opinion filed June 4, 1973.—Rehearing denied September 27, 1973.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

The circuit court of Rock Island County entered judgment upon a jury verdict in the amount of $449,757 in favor of the plaintiff, Leva Adkins, administratrix of the estate of Everett Harmon Adkins, deceased, against the defendants, Chicago, Rock Island and Pacific Railroad Company, W. B. Throckmorton, and R. V. Loftus. The appellate court ordered a remittitur in the amount of $199,757 and affirmed. (*Adkins v. Chicago, Rock Island & Pacific R.R. Co. (1971), 2 Ill. App. 3d 906.*) We allowed the defendants' petition for leave to appeal.

The plaintiff's decedent, Everett Harmon Adkins, was killed on October 6, 1966, when the tractor trailer he was driving was struck by the defendant railroad's train at a railroad crossing at Booneville, Iowa. On October 18, 1966, the plaintiff, a resident of Michigan, brought an action in the United States District Court for the Southern District of Iowa. The railroad, a Delaware corporation doing business in Iowa, Illinois and other States, was the sole defendant. Depositions were taken and interrogatories and admissions were filed and answered, and the case was set for trial on September 11, 1967. After certain rulings were made at a pretrial hearing, the plaintiff moved for a continuance, and the case was reset for trial on December 5, 1967. It was not tried, however, because on November 9, 1967, the case was dismissed on the plaintiff's motion.

On January 16, 1968, the plaintiff instituted the present action in the circuit court of Rock Island County, again naming the railroad as the sole defendant. On March 15, 1968, a motion to dismiss on the ground of *forum non conveniens* was filed by the railroad. Before the court ruled on the motion, the plaintiff filed an amended complaint on May 14, 1968. The amended complaint added W. B. Throckmorton, chief engineer, and R. V. Loftus, traffic engineer, of the railroad, both of whom were Illinois residents, as defendants. The trial court then denied the motion to dismiss, and thereafter the case proceeded to trial. Both the railroad and the individual defendants raised the issue again in their post-trial motions.

On this appeal the defendants contend that the trial court erred in not dismissing the case on the ground of *forum non*

conveniens. They also urge that the trial court erred in admitting certain evidence, and in instructing the jury. Because we are satisfied that the motion to dismiss should have been granted, we do not discuss the other alleged errors.

Forum non conveniens is a doctrine that is founded in considerations of fundamental fairness and sensible and effective judicial administration. In the application of these basic considerations a court may decline jurisdiction of a case "even though it may have proper jurisdiction over all parties and the subject matter involved" *(Whitney v. Madden (1948), 400 Ill. 185, 189, cert. denied, 335 U.S. 828, 93 L. Ed. 382, 69 S. Ct. 55),* whenever it appears that there is another forum that can better "serve the convenience of the parties and the ends of justice." *(Lonergan v. Crucible Steel Co. of America (1967), 37 Ill. 2d 599, 606.)* Factors to be considered in disposing of a motion to dismiss *forum non conveniens* include the relative capacities of the two courts to provide a fair trial, the relative inconvenience to witnesses and parties, and the burden placed upon the taxpayers and residents of the jurisdiction to which the cause of action is transported.

The railroad was the sole defendant in the complaint filed in the circuit court of Rock Island County. The only connection Illinois had with the lawsuit was that the railroad does business here. This fact is not significant in determining a motion to dismiss on the ground of *forum non conveniens,* because such a motion assumes that both courts can obtain jurisdiction over the defendant. The plaintiff is a resident of Michigan, as was the deceased before his death. The collision with which the action is concerned took place in Iowa, over 200 miles from Rock Island, Illinois. This means that a jury in Iowa could view the scene of the accident, but an Illinois jury could not. It also means that the rights of the parties are to be determined by the law of Iowa, and certainly an Iowa judge is in a superior position to make that determination. A fair trial means a prompt trial, and the Annual Report of the Administrative Office of the Illinois Courts shows that in 1968, when the motion to dismiss was made, the average delay between the date of filing and the date of verdict in civil cases in the 14th Judicial Circuit, which includes Rock Island County, was 18.5 months.

All of the factors normally considered thus point to the conclusion that Rock Island County is not an appropriate forum for the trial of this case. That conclusion is reinforced by the unusual circumstances of this case. The case was ready for trial in Iowa more than a year and a half before it was tried in Illinois. The case in Iowa was voluntarily dismissed by the plaintiff, who was

dissatisfied with pretrial rulings of the Iowa judge concerning the admissibility of certain evidence. Some of those rulings involve questions that have been raised in this court. What we have, then, is in practical result an appeal to the Illinois courts from the rulings of the Iowa judge. This is unseemly business, and in our opinion the denial of the motion to dismiss, which was accompanied by a waiver of the statute of limitations, was an abuse of discretion.

Our conclusion is not altered by the circumstance that the two individual defendants, one of whom was a resident of Cook County, Illinois, and the other a resident of Will County, Illinois, were added as defendants. They were not added until four months after the present action in Illinois was commenced, and more than a year and a half after the plaintiff first sued the railroad in Iowa. For many years our statutes have expressed the policy of this State against the joinder of defendants "without probable cause and not in good faith for the purpose of obtaining a judgment against him but solely for the purpose of fixing venue in that county." (See, Ill. Rev. Stat. 1971, ch. 110, pars. 5, 9; see also, Hurd's Stat. 1908, ch. 110, par. 6.) Interpreting this language, the appellate court stated in *Green v. Unity Container Corp. (1955), 7 Ill. App. 2d 215, 221:* " 'Good faith' is hardly capable of an exact definition; it consists of an honest intention to abstain from taking any unconscientious advantage of another, even through forms and technicalities of the law. 'Probable cause' is a reasonable belief that the claim on which the suit is brought is valid."

It seems apparent that the individual defendants were joined in order to make the Illinois action look different from the Iowa action, and thereby provide some sort of basis upon which the denial of the motion to dismiss could be predicated. While this situation is not governed by the language of our venue statutes applies to the present situation.

Whether persons occupying the positions of the individual defendants in this case are liable in tort to a plaintiff who suffers injuries as the result of a defective grade crossing is not clear as a matter of substantive law. We have found no Iowa decisions indicating liability, and the defendants in their reply brief have set forth the decision of the United States District Court for the Southern District of Iowa, in *White v. Chicago, Rock Island and Pacific Railroad Co.* (Civil No. 5–121–D, S.D. Iowa, March 3, 1972), holding, in a similar situation, that individual employees of a railroad are not liable. We are not convinced that the individual defendants were joined with probable cause and in good faith for the purpose of obtaining a judgment against them.

The judgments of the circuit and appellate courts are reversed, and the cause is remanded to the circuit court of Rock Island County, with directions to grant the motion to dismiss.

Reversed and remanded, with directions.

MR. JUSTICE GOLDENHERSH, dissenting:

I dissent. I agree with the circuit and appellate courts that upon this record the doctrine of *forum non conveniens* is clearly inapplicable and assuming, *arguendo*, that there was an issue here of *forum non conveniens*, the majority have disregarded the rule that the trial court's decision will not be disturbed unless the record shows an abuse of discretion.

Prior to discussing the legal issues it is essential to correct a factual error in the majority opinion. The majority states: "The collision with which the action is concerned took place in Iowa, over 200 miles from Rock Island, Illinois. This means that a jury in Iowa could view the scene of the accident, but an Illinois jury could not." The undisputed fact is that the highway and railroad crossing have been completely rebuilt and it will not be possible for a jury to view the scene; nor does the record reflect either that such is the custom in Iowa, or that it was possible to do so, or that such was the intent, when the case was pending in the United States District Court in Des Moines.

The majority, relying solely upon an unreported decision of a Federal District Court Judge, conclude that under Iowa law plaintiff cannot prove a cause of action against the defendants Throckmorton and Loftus. It should be noted at this point that the residence of these gentlemen in Illinois is no happenstance, as the undisputed fact is that the defendant railroad is not merely doing business in Illinois, but that its principal offices are located in Chicago and these two executives are stationed there. Further, as will be demonstrated, neither the decision relied upon nor the opinions of the Iowa Supreme Court support the majority's conclusion, and under Iowa law the record presented an issue of fact as to whether these individual defendants, along with their employer, are liable to the plaintiff.

In the unreported decision upon which the majority rely, the United States District Judge allowed a motion to remand to the State court a case which had been removed to the district court. In his decision the district judge, relying on four Iowa cases, *Cramblitt v. Percival-Porter Co. (1916), 176 Iowa 733, 158 N.W. 541; Wendland v. Berg (1919), 188 Iowa 202, 174 N.W. 410; Montanick v. McMillin (1938), 225 Iowa 442, 280 N.W. 608; and Moore v. Murphy (1963), 254 Iowa 969, 119 N.W. 2d 759,*

held that the allegations of the complaint did not state a cause of action against the individual defendants. The charges of negligence in those pleadings are clearly distinguishable from the negligence which was charged and proved against the two individual defendants in this case. The district judge also recognized that "Although there is authority for the rule that an agent or employee is not liable for mere nonfeasance or omission to perform a duty owed to the principal or employer, the court believes the law now seeks to determine whether the employee owes a duty to the public as well as the employer which has not been performed, whether nonfeasance or misfeasance. [Citations.] It is therefore necessary to look to the charges of negligence to see whether any one or more possibly states a duty owed these plaintiffs by the individually named defendants."

The Iowa rule is stated in *194 Iowa 926, 935, 189 N.W. 824, 828,* wherein the Supreme Court of Iowa said:

> "If the agent is put in control of the situation with the express or implied consent of the principal or is given or exercises such powers within his authority that an independent actor would have, it is quite generally held that he owes a duty to third persons to use due care in what he does, the same as any other individual. Such a control of property imposes upon him a duty, not altogether and simply as agent, but as a custodian and controller of such property for the purposes in hand. The fact that he also owes a special duty to his principal is not material.
>
> It may be conceded he owes such a duty and his failure to perform properly may be considered as nonfeasance to his principal, but it is misfeasance to a third person injured thereby. Briefly stated the negligence of the agent converts what otherwise would have been a proper performance of his duties into misfeasance."

An examination of the cases cited in the opinion of the district judge shows that although distinguishable on the facts, they do not conflict with the holding in *Emery.* [Sic].

The record shows that the defendant Throckmorton was chief engineer for the defendant railroad and defendant Loftus was his assistant. They were directly responsible for the safety of the crossing, had made inspections of the scene and for a period of at least two years prior to the occurrence were aware of the hazardous conditions which prevailed. Loftus testified that he made a survey of the crossing in 1964 and reported to Throckmorton that because of the "exposure factor" automatic protection of the

crossing would "merit consideration." At that time he did not notice whether there were two crossbuck signs at the crossing, and if he had noticed that there was no sign south of the crossing he would have had one installed. Prior to that time, there had been correspondence between defendant Throckmorton and a Mr. Norman, a railroad-crossing engineer for the Iowa State Highway Commission, concerning the installation of flashing light signals with a rotating stop sign and possible short arm gates. Loftus testified that "The only objection we had to the proposal, we didn't believe it needed gates. We agreed with Mr. Norman that flashing lights and rotating stop sign would take care of the situation. The minimum time of advance warning that automatic signal gives the motorist on the highway of the approach of a train is twenty seconds, plus a lag of three seconds. It was the exposure factor at the Booneville crossing that indicated the need for automatic signals in 1964. We asked the State Highway Commission what kind of figure they would give us on this road, and they told us around four hundred and fifty, I believe, and we immediately could see that this was justified movement on the part of the public authorities and the railroad to come to an agreement and put flashing lights in."

As stated by the appellate court the applicability of the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process." (2 Ill. App. 3d 906, 912.) The record fully supports the appellate court's statement "that prior to verdict there was never available a choice of forum, since Illinois was the only state in which all three defendants could be sued. At no time did the [sic] individual defendants Throckmorton and Loftus consent or in any way indicate that they would consent to be sued in any state other than Illinois, their state of citizenship and residence. It is significant that the defendants Throckmorton and Loftus never raised the issue of *forum non conveniens* at any time prior to veridct. In fact, there was never any claim, affidavit or motion prior to trial in which the individual defendants Throckmorton and Loftus contended that the complaint against them should be dismissed or that the pending action should be heard by a forum other than the circuit court of Rock Island County." 2 Ill. App. 3d 906, 912.

The majority conclude that the dismissal of the case in the Federal court in Iowa was "unseemly business" impelled by some devious or improper motive. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that except under enumerated circumstances not here present, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such

terms and conditions as the court deems proper." The record does not disclose whether the defendant railroad objected to the dismissal of the case, and in any event, dismissal under Rule 41(a)(2) is a matter for the discretion of the trial court. *(Johnston v. Cartwright (8th Cir. 1966), 355 F. 2d 32.)* Since the majority presume that an Iowa judge "is in a superior position" to determine the rights of the parties under Iowa law, it may be presumed that the United States District Judge, sitting in Iowa, who granted plaintiff's motion to dismiss without prejudice was aware of the Eighth Circuit's decision in *Johnston*, particularly since he was also the trial judge who dismissed that case and now serves on the Court of Appeals for the Eighth Circuit. It may further be presumed that the district judge would not have made a discretionary ruling without a sound basis for so doing, and that had there been any indication of the improper motives which the majority attribute to plaintiff, he would have denied the motion.

The majority state that as the result of the circumstances shown "What we have, then, is in practical result an appeal to the Illinois courts from the rulings of the Iowa judge." And in reaching its conclusion the majority state: "It seems apparent that the individual defendants were joined in order to make the Illinois action look different from the Iowa action, and thereby provide some sort of basis upon which the denial of thy motion to dismiss could be predicated. While this situation is not governed by the language of our venue statutes, it is clear that the policy expressed in those statutes applies to the present situation." Adopting the majority's definitions of "good faith" and "probable cause" *(Green v. Unity Container Corp., 7 Ill. App. 2d 215, 221)* an examination of this record shows that the defendant railroad was not even inconvenienced, let alone "taken advantage of," by being required to try this case in Rock Island County, and the fact that the jury returned a verdict against the individual defendants, which was approved by the circuit court and affirmed by the appellate court, is certainly strong evidence of a "reasonable belief" that plaintiff had a valid claim against them. However the majority may choose to characterize their decision, the effect of it is that this court, without an evidentiary basis for so doing, has reversed a discretionary ruling of the circuit court and has held that the dismissal, approved by a Federal judge vested with discretion to allow or disallow it, was for an improper motive.

In *Fender v. St. Louis Southwestern Railway Co., 49 Ill. 2d 1,* in which case the writer recused himself, the court said, "The discretion to be exercised in ruling on a *forum non conveniens* motion is that of the trial court. *(Whitney v. Madden (1948), 400 Ill. 185, 190; People ex rel. Chesapeake and Ohio Railway*

Co. v. Donovan (1964), 30 Ill. 2d 178, 180.) In this case the appellate court reversed the trial court, apparently not because that court had abused its discretion, but because the appellate court felt that the trial court's discretion had not been 'wisely exercised.' In our opinion the appellate court misapprehended its role and misapplied the governing principles." (49 Ill. 2d 1, 4.) I respectfully submit that this court misinterpreted the holding of the appellate court in *Fender* that an examination of its opinion (125 Ill. App. 2d 211) shows that the appellate court did not misapprehend its role and that it applied the established rule that in reviewing a trial court's ruling to determine whether it was an abuse of discretion, a distinct difference is drawn between those rulings which also involved a finding of fact and those, as was the case in *Fender*, where there was no dispute as to the facts and the same documentary evidence upon which the circuit court based its ruling was also before the appellate court. Furthermore, the language quoted from the appellate court's opinion is clearly taken out of context. The appellate court said: "From our review of the authorities, we conclude that before a motion to decline jurisdiction may be granted it must be apparent that the first three conditions enumerated in Whitney, i.e., the existence of an appropriate forum, the nonresidence of the parties, and a transaction which did not take place in Illinois are present along with one or more of the remaining conditions: i.e., the bringing of the action in Illinois for the purpose of frustrating the defendant, the undue burdening of and great and unnecessary inconvenience to the defendant, or the unnecessary burdening of the court. We have searched Cotton for other 'appropriate factors to be considered,' as suggested in Donovan, and except for the one expressly disavowed by the court, fail to find any which modify the requirements enumerated in Whitney." (125 Ill. App. 2d 211, at 217.) After discussing the appropriate scope of review the court said: "This court has reviewed, and has presently pending, cases brought under F.E.L.A. and arising from occurrences in other states. From our knowledge of the records in those cases, we conclude that although some additional expense may be incurred for travel and maintenance, the absence of subpoena power is not a material factor in compelling the attendance of employee witnesses. In many cases reviewed by this court, both F.E.L.A. and others, much of the medical testimony adduced by both plaintiffs and defendants is that of physicians practicing in St. Louis, Missouri, not amenable to subpoena, and is introduced in the form of evidentiary depositions. With respect to the testimony of nonmedical, nonemployee witnesses, defendant's motion and affidavit suffer from the deficiencies which appear to have been the deciding factors in Cotton. We conclude, therefore, that it is not, as

required by the authorities, apparent that the action was brought in Illinois for the purpose of frustrating, unduly burdening, or causing great and unnecessary inconvenience to the defendant. With respect to the question of whether retention of the case is an undue burden on the court, it is noted that both paragraph 12 of defendant's motion (supra) and plaintiff's assertion that 'the Circuit Court of St. Clair County does not have a large backlog of cases . . . . ' (supra) state mere conclusions, there are no facts alleged by either party, and the trial court made no finding on this issue. As to the availability of another appropriate forum we quote from Lonergan v. Crucible Steel Co. of America, 37 Ill. 2d 599, 299 N.E. 2d 536, wherein at page 606, the court said: 'Defendants first assert that there is a serious backlog of cases in Cook County which requires reasonable restrictions on shareholders litigation against foreign corporations. This same argument was rejected in Cotton v. Louisville and Nashville Railroad Co., 14 Ill. 2d 144. Here, as in the Cotton case, there is no evidence as to the condition of the courts' dockets in any other forum.' " (125 Ill. App. 2d 211, 218-219.) It should be further noted that there is little significance in either the 18.5 months "average delay" between filing and verdict mentioned in this case or the 21.7 months "average delay" mentioned in *Fender*. This "average" includes all cases without consideration of the cause of the delay and I know of no lawyer experienced in the trial of plaintiffs' personal injury cases who will not agree that a case of significance, involving substantial discovery procedures or a serious injury can rarely be prepared for trial in less than 18 months..

The majority say that "We are not convinced that the individual defendants were joined with probable cause and in good faith for the purpose of obtaining a judgment against them," and conclude that "the denial of the motion to dismiss, which was accompanied by a waiver of the statute of limitations, was an abuse of discretion." The record shows that the offer to waive the statute of limitations was made for the first time in defendants' motions for judgment *n.o.v.*, contained no offer on the part of the individual defendants to accept service of Iowa process, and is limited to plaintiff's refiling "in the State or Federal Courts in Polk or Dallas County, Iowa." It is further noted that prior to the filing of those motions, the individual defendants had raised no issue of *forum non conveniens* and it is not readily apparent in what manner a post-trial motion could affect the trial court's discretion with respect to a ruling made prior to trial.

Until this case, the doctrine of "fundamental fairness" appears to have been limited in its application to those situations where basic constitutional rights were invloved. I find it difficult to

equate any alleged inconvenience which defendants may have suffered in being forced to try this case in the jurisdiction from which they operate the railroad system with a loss of a substantial constitutional right. "Fundamental fairness," if applicable to this record at all, would require the invocation of the rule enunciated in *Gulf Oil Corp. v. Gilvert, 330 U.S. 501, 91 L. Ed. 1055,* where it is stated, at page 508, "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

By this decision the majority, without any evidentiary basis, have made findings of fact with respect to plaintiff's good faith, have contrary to the controlling Iowa decisions decided that there is "no probable cause" or "good faith purpose" in joining the individual defendants, and have decided not only that the trial court abused its discretion and that the appellate court erred, but also that the Federal district judge somehow abused his discretion when he permitted plaintiff to dismiss her action without prejudice. The record contains no basis to presume that the district judge was so lacking in perception as to fail to detect that plaintiff's motion for voluntary dismissal was filed for the "unseemly" purpose of taking "an appeal to the Illinois courts" from his rulings. I respectfully submit that in this majority opinion, when considered with *Fender,* this court has effectively annihilated the few guidelines to be found in our earlier cases and bowdlerized the rule that the trial court's determination of a *forum non conveniens* question will not be disturbed unless the record shows an abuse of discretion.

This record reflects a lengthy trial and does not support defendants' contention that because it was held in Illinois they were in any manner inconvenienced, let alone prejudiced. It further reflects that the case was well and fairly tried by extremely able counsel who asked and gave no quarter. In my opinion to upset this verdict on the grounds set out in the majority opinion is a miscarriage of justice.

I do not agree with the opinion of the appellate court on the question of damages. The question of whether this verdict was excessive is one of substance, and not procedure, and must, therefore, be decided under the law of Iowa. In *De Toskey v. Ruan Transport Corp. (Iowa 1949), 40 N.W. 2d 4, 6,* the Supreme Court of Iowa held that in a wrongful death case the verdict should not be disturbed "unless it [is] so flagrantly excessive as to raise a presumption that it was the result of passion, prejudice, or undue influence, and not the result of an honest exercise of the judgment and the lawful discretion of the jury." In *Schmitt v. Jenkins Truck*

Lines, Inc. (Iowa 1969), 170 N.W. 2d 632, the Supreme Court of Iowa affirmed a judgment awarding damages in the amount of $264,162.74 for the death of a 38-year-old mother of six minor children in 1965, who since her marriage had not worked outside her home. Based upon these decisions I would affirm the judgment in the amount of the jury verdict.

44876

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JUSTIN TAFT
CLERK

TELEPHONE
AREA CODE 217
525-3033

September 27, 1973

Mr. Harry M. Philo
Attorney at Law
2761 E. Jefferson Ave.
Detroit, Michigan 48207

No. 44876 - Chicago, Rock Island and Pacific Railroad Company; et al., appellants, vs. Leva Adkins, Admrx., etc., appellee. Appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

10

LEVA ADKINS, Plaintiff-Appellee, v. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY *et al.*, Defendants-Appellants.

(No. 69-135; Affirmed upon remittitur, otherwise reversed and remanded.)

Third District – October 5, 1971.

Rehearing denied November 15, 1971.

Mr. JUSTICE SCOTT delivered the opinion of the court:

MODIFIED OPINION

This is an appeal from a judgment of the circuit court of Rock Island County, Illinois.

The plaintiff in this litigation is a resident of the State of Michigan. The defendant railroad is a Delaware corporation doing business in Iowa and Illinois. The individual defendants. Throckmorton and Loftus, are officers of the railroad and are residents respectively of Cook and Will Counties, Illinois.

The plaintiff brought action to recover damages for the death of her deceased husband which resulted from a grade crossing collision between defendant's train and a truck driven by the decedent, Everett Adkins. The collision occurred at Booneville in the state of Iowa on October 6, 1966.

This suit was first filed on October 18, 1966, in the U.S. District Court for the Southern District of Iowa, Central Division, at Des Moines, Iowa. As originally filed the railroad was the sole defendant. On September 8, 1967, a pre-trial conference was held, at which time the defendant railroad's Motion *in Limine* was considered and granted. The cause was then set for trial on December 5, 1967, however, prior to this time the plaintiff moved to dismiss the action. On January 16, 1968, the case was re-filed in the circuit court of Rock Island County, Illinois, and again the sole defendant was the railroad. On March 15, 1968, the defendant railroad filed a motion to dismiss the action on the grounds of *forum non conveniens*. Thereafter on April 29, 1968, the plaintiff filed a motion to amend the complaint by adding individual defendants, namely; W. B. Throckmorton and R. V. Loftus, agents and employees of the railroad. On August 16, 1969, the plaintiff's motion to amend was allowed and the defendant railroad's motion to dismiss on the grounds of *forum non conveniens* was denied.

The errors assigned on this appeal are as follows: (a) the trial court erred in not sustaining the motion to dismiss on the grounds

of *forum non conveniens*, (b) that the court erred in failing to dismiss the individual defendants from the case, (c) that plaintiff's decedent was guilty of contributory negligence, (d) that the trial court ruled incorrectly on certain objections to evidence, (e) that the trial court erred in instructing the jury, (f) that the verdict was excessive and should be set aside, and (g) that the trial court erred in denying certain motions. To adequately consider these claimed errors we will in turn state them with greater specificity and supply additional factual information where the same is relevant.

Directing our attention to the alleged error of the trial court's ruling on the motion to dismiss the action on the grounds of *forum non conveniens*, we wish to note our awareness of the fact that our Supreme Court has approved the application of the doctrine in certain instances. (*Whitney v. Madden*, 400 Ill. 185, 79 N.E. 2d 593; *Cotton v Louisville & Nashville Railroad Company*, 14 Ill. 2d 144 152 N.E. 2d 385.) The doctrine is an equitable one and has been described as "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." See "The Doctrine of *Forum Non Conveniens* in Illinois," University of Illinois Law Forum, 1964, p. 646.

We are cognizant of the general rule that application of a doctrine lies primarily within the discretion of a trial court and that the motion should be allowed if a choice of forum is purely vexatious, but should be denied when there is a relevant connection between the litigation and the forum chosen (*Cotton v. Louisville & Nashville Railroad Company, supra*); also, we are aware of the excellent judicial discussion of the doctrine by Mr. Justice Jackson in the Case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L.Ed. 1055. It was in this case that Mr. Justice Jackson discussed certain factors which may persuade the trial court to dismiss an action, *e.g.*, relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of premises, court calendar congestion, the burdens of jury duty upon people of a community which has no relation to the litigation and the appropriateness of having a forum that is at home with the state law that must govern the case.

Mr. Justice Schaefer in his dissent in the *Cotton* case says that the court should consider "first, the relative capacity of the two forums to furnish the essentials of a fair trial, such as the power to compel the attendance of witnesses and the production of documents and to afford the jury an opportunity to view the

scene if that is appropriate, and second, the relative convenience of the witnesses and the parties." *Cotton v. Louisville & Nashville Railroad Company, supra.*

Before we examine the instant case in the light of guideiines set forth by Mr. Justices Jackson and Schaefer, we must note that both of these eminent jurists recognized that it is elementary that the doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process. *Gulf Oil Corp. v. Gilbert, supra; Cotton v. Louisville & Nashville Railroad Company, supra.*

After an examination of the record in the case now before us on appeal we can only conclude that prior to verdict there was never available a choice of forum, since Illinois was the only state in which all three defendants could be sued. At no time did the individual defendants Throckmorton and Loftus consent or in any way indicate that they would consent to be sued in any state other than Illinois, their state of citizenship and residence. It is significant that the defendants Throckmorton and Loftus never raised the issue of *forum non conveniens* at any time prior to verdict. In fact, there was never any claim, affidavit or motion prior to trial in which the individual defendants Throckmorton and Loftus contended that the complaint against them should be dismissed or that the pending action should be heard by a forum other than the circuit court of Rock Island County.

The exercise of discretion by a trial court cannot be abused when in fact the court was not vested with the power or right of discretion. In the case before us the trial court did not have presented to it a second forum which would be available to all defendants so we fail to see any error in the court's refusal to grant the motion for dismissal based upon the doctrine of *forum non conveniens.*

In determining that the doctrine of *forum non conveniens* was inapplicable in the case before us we must necessarily presuppose that the individual defendants Throckmorton and Loftus were proper parties to the litigation. We do presuppose since we believe that the law is settled as applied to the facts in the case before us that Throckmorton and Loftus were indeed proper parties to the suit.

The defendant argues that agents such as Throckmorton and Loftus can be liable to third parties for wrongful acts of misfeasance committed by them, but that as such agents they are not personally liable to a third party for mere nonfeasance, or in other words where they failed to perform some duty owed to an injured party. In support of this contention the defendants cite the case

of *Wendland v. Berg*, 188 Ia. 202, 174 N.W. 410. We do not believe that the law is as clear cut in regard to the misfeasance and nonfeasance distinctions as the defendants claim it is. In fact in our present society liability or lack of liability to third parties based upon the misfeasance or nonfeasance test has become such a murky field that the old test itself has become obliterated and useless. We believe that this conclusion is sustained when we review the history of Judge Story's rule, which for many years was the settled law regarding an agent's liability to third parties.

"Judge Story, in his work on the Law of Agency, published in 1839, founded the following statement on what he terms Lord Holt's celebrated judgment in Lane v. Cotton: 'The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general (for there are exceptions), liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal, there being no privity between him and such third persons, but the privity exists only between him and his principal. And hence the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *"respondeat superior."*

'The distinction, thus propounded, between misfeasance and nonfeasance, between acts of direct, positive wrong, and mere neglects by agents, as to their personal liability therefor, may seem nice and artificial, and partakes, perhaps, not a little of the subtlety and overrefinement of the old doctrines of the common law. It seems, however, to be founded upon this ground: that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasances or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation, except those to whom he has become directly bound or amenable for his conduct.' Story, Agency, 9th Ed. § 309."

In making this statement, Judge Story seems to have overlooked the obligations which are imposed upon all living in a civilized community, in favor of their neighbors. Because of this obligation the law and public policy impose certain duties upon persons who have contracted with a master to do a certain thing which makes them liable to third persons for its nonperformance. Most acts of negligence are, in final analysis, acts of

nonfeasance, but the books are full of cases in which servants and agents have been held liable for negligence. While, therefore, many cases have attempted to maintain the formula laid down by Judge Story, they have, in practice, either distinguished it so that little is left of it, or departed from it altogether." 20 A.L.R. 97, p. 103-104.

Today the courts are agreed that an agent is liable to a third person for damages resulting from violation of a duty which such agent owes to the third person and it matters not whether that violation be one of malfeasance, misfeasance or nonfeasance, but whether such a duty exists under any particular set of circumstances, a difference of opinion prevails in various jurisdictions, due largely to a disagreement as to the exact meaning of the use of the terms "malfeasance", "misfeasance" and "nonfeasance" and their application to the questions before the court.

In most jurisdictions the courts are apparently in accord in holding the servant of a railroad company jointly liable with his master for injuries resulting from a crossing accident which occurs as the result of the failure of the servant to sound a warning as the train approaches the crossing, (*Judd v. Oregon Short Line R. Co.*, 4 F. Supp. 657; *Strom v. Payne*, 119 S.C. 51, 111 S.E. 798; *Chesapeake & Ohio Railway Co. v. McCoy*, 228 Ky. 752, 16 S.W. 2d 170), or the failure of a railroad employee with a lighted lantern in his hand on a dark night at a crossing to warn of an approaching train, persons in an automobile which he knows to be also approaching, since this duty is not solely a duty to his master but is clearly a duty to the public as well. *Burrichter v. Chicago M. & St. P. R. Co.*, 10 F. 2d 165.

The defendants state that it is the law in Iowa as elsewhere that a corporate officer is not liable to a third person for failure to perform a duty owed solely to the corporation and not to the public generally. Is not then the pivotal question whether defendant Throckmorton, the chief engineer, and defendant Loftus, the engineer of public works of the defendant railroad, did or did not owe a duty to the public as well as to their employer? We believe that this is the crux of the question as to whether Throckmorton and Loftus were proper parties to the action. We further believe that the law of Iowa is clear on this point and they were proper defendants. The Iowa Supreme Court has said:

> "Liability is predicated on duty. If the agent is put in control of the situation with the express or implied consent of the principal or is given or exercises such powers within his authority that an independent actor would have, it is quite generally held that he owes a duty to third persons to use due

care in what he does, the same as any other individual. Such a control of property imposes upon him a duty not altogether and simply as agent, but as a custodian and controller of such property for the purposes in hand. The fact that he also owes a special duty to his principal is not material.

It may be conceded he owes such a duty and his failure to perform properly may be considered as nonfeasance to his principal, but it is misfeasance to a third person injured thereby. Briefly stated, the negligence of the agent converts what otherwise would have been a proper performance of his duties into misfeasance." Emery v. American Refrigerator Transit Co., 194 Ia. 926, 189 N.W. 824.

Therefore, according to our analysis of the law the trial court did not err in overruling the motion for directed verdict made by defendants Throckmorton and Loftus.

The defendants claim that the plaintiff's decedent was guilty of contributory negligence as a matter of law and that the trial court erred in not sustaining defendants' motion for directed verdict and their motion for judgment notwithstanding the same. Both the plaintiff and the defendants cite the case of *Pedrick v. Peoria and Eastern Railroad Company*, 37 Ill. 2d 494, 229 N.E. 2d 504, as setting forth the substantive law regarding the granting or denying of such motions. The *Pedrick* case not only is the recognized law in Illinois but also reflects the law followed in Iowa. It was in this case that our Illinois Supreme Court stated:

"Verdicts ought to be directed and judgments *non obstante veredicto* entered only in those cases in which all of the evidence when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

In the case before us the decedent Adkins was a 37 year old professional truck driver. He was at least somewhat familiar with the crossing in question since he had stayed at a motel located across the track on at least four previous occasions. He was driving a trailer rig of some 50 feet in length having total weight of twenty-two or twenty-three thousand pounds. Approaching the Booneville crossing from the east on Highway No. 6 the railroad tracks parallel the highway for between three and five miles. In this stretch before the crossing the land is flat. The railroad tracks and the highway run 110 feet apart at the Booneville turnoff and the tracks are slightly higher than the turnoff or entry road into Booneville. The decedent in proceeding west on the highway and north on the turnoff road was afforded an unobstructed view to the west for 783 feet to the east end of a railroad bridge and then

the view to the west was obstructed if at all only by the open cross sections on the bridge. On the north side of the tracks there is a stop sign and a crossbuck sign. No such signs were present on the south side of the track as the decedent approached. The accident occurred at 10:15 P.M. on a clear night. The train was travelling from west to east at a speed of 55 to 59 miles per hour. There were two headlights on the train which projected a beam from 200 to 400 yards down the track. The whistle of the train commenced blowing several hundred yards west of the crossing and continued to blow until the time of impact. According to witnesses the decedent was driving the tractor trailer rig at a speed of approximately 10 miles per hour. A reconstruction expert called by plaintiff testified that if the train was traveling 56 miles per hour it would have taken 9.5 seconds to travel the 783 feet from the railroad bridge to the crossing if the decedent had been proceeding at a speed of 14 miles per hour then to have stopped at the crossing he would have to have first observed the train at the latest when it was 604 feet from the crossing and at the earliest when it was 859.3 feet from the crossing.

The reconstruction expert testified that the decedent could have been looking into his right outside rear view mirror in order to make sure that his equipment was clearing the corner of the intersection as he swung the unit onto the road going north which led to the crossing. The expert further testified in detail as to his opinion of the time involved in the decedent perceiving that a train was coming in his direction. He testified that it was reasonable that the decedent would take as long as one-half of a second to perceive the train was coming, that it was reasonable that one more second would be consumed as the decedent comprehended the hazard and risk and that one further additional second would be used by the decedent to decide in the emergency facing him as to what action he should take to safeguard himself.

It is the defendant's contention that this evidence when viewed most favorably to the plaintiff shows either that the decedent was not keeping a proper lookout or that he was proceeding at a rate of speed which for his particular rig made the collision unavoidable and therefore the decedent was guilty of contributory negligence.

It is recognized in the *Pedrick* case that where a substantial factual dispute is disclosed by the evidence, either on the issue of plaintiff's due care or defendant's negligence, or where an assessment as to credibility of witnesses and an election between conflicting evidence may be decisive, the constitutional right of the parties to a jury determination should be carefully preserved and

it would be erroneous to direct a verdict in such cases. The question, therefore, is whether the record in this case requires or justifies the direction of a verdict. *Wolfe v Whipple*, 112 Ill. App. 2d 255, 251 N.E. 2d 77.

We are not now faced nor are we authroized to determine questions of fact when motions are made for a directed verdict or judgment notwithstanding the verdict. Instead we must determine whether the evidence when viewed in its aspects most favorable to the nonmoving party so overwhelmingly favors the movant that a contrary verdict for the opponent could not stand.

When the evidence in the case before us on appeal is viewed in its aspects most favorable to the plaintiff we find that decedent was awake, having put on his turn signals, he was wearing a seat belt, he was driving 10 to 14 miles per hour and he had to devote for some period of time his attentions to the traffic and conditions on the highway No. 6 as he turned onto the approach which led to the crossing. There was no railroad crossbuck sign on the decedents side of the track. There is evidence in the record which may well explain the circumstances of the decedent driving into a collision with a train and there was also a question as to the degree of familiarity the decedent had with the crossing based upon his four previous all-night stops in Booneville, the last being six months prior to the date of the accident.

The defendants cite a number of cases illustrating the standard of care or type of conduct which should be followed if one is to be free from contributory negligence. In affirming submission of issue of plaintiff's decedent driver's contributory negligence to the jury in a railroad crossing case Mr. Justice Cardozo said:

> "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law * * * . In default of the guide of customary conduct what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of the jury." Pokora v. Wabash Ry. Co., 292 U.S. 98.

The case of *Skala v. Lehon*, 258 Ill. App. 252, is cited as authority for the principle that a person who gives another reasonable cause for alarm cannot complain when that person so alarmed does not exercise cool presence of mind in reacting to it; that the latter's conduct should be judged not in the light of what later events reveal would have been better or safer but against the standard of how a reasonable man would have reacted under circumstances of the same sudden alarm.

Based upon the record we believe that there are a number of

facts which required submission to a jury the proposition of whether plaintiff's decedent was free from contributory negligence and whether the defendants were guilty of negligence.

The defendants argue that reversible error was committed by the trial court in its ruling on certain objections to evidence. Specifically the court permitted an expert witness to testify that he considered the railroad crossing one of the most dangerous he had ever seen; the court permitted a reconstruction expert to testify; that the plaintiff was permitted to introduce into evidence certain traffic device manuals; testimony relative to whether the defendant railroad had notified public authorities of the absence of a warning sign and crossing sign was permitted to be introduced, and the court permitted the plaintiff to introduce into evidence an intra-company letter of the defendant railroad. The defendants objected to the ruling of the trial court permitting all of this evidence to be submitted to the jury.

A railroad crossing protection expert, being a plaintiff's witness, in response to a question propounded to him on direct examination in regard to the railroad crossing in question stated:

> "Based upon my experience and observation of thousands of transactions, I consider this one of the most dangerous that I have ever seen."

The defendants argue that in permitting this testimony it had the effect of invading the province of the jury in deciding the basic issue of the case. The defendants cite a number of cases in support of their contention, including *Hughes v. Wabash R. R. Co.*, 342 Ill. App. 159, 95 N.E. 2d 735. However, we believe that the law regarding this question was settled in *Merchants National Bank of Aurora v. The Elgin, Joliet & Eastern Railway Co.*, 121 Ill. App. 2d 445, 257 N.E. 2d 216. In this case the court stated:

> "Cases from other jurisdictions which involve a specific question of expert opinion as to the hazardous nature of a railroad crossing are not in agreement. We believe the better reasoning delineates a trend toward permitting such testimony in the sound discretion of the court when the witness has a peculiar knowledge or experience not common to the world in general which may aid the finder of fact in determining the issues before it. The court and jury is, of course, not bound to accept the conclusions of the expert. See Shutka v. Pennsylvania R. R. Co., 181 F. 2d 490, 409 (N.J. 1962); Southern Pacific Company v. Watkins, 435 P. 2d 498, 508 (Nev. 1967); Bridger v. Union Railway Company, 355 F. 2d 382, 387 (C.C.A. 6, 1966)."

The plaintiff presented the opinion testimony of a traffic accident reconstruction expert relative to the time which expired when the decedent first perceived his dangerous situation, comprehended the problem and decided on a course of action. Also opinion testimony was received from the expert as to the time used by the decedent in applying his brakes, and further he gave evidence as to the approximate speed of the truck just prior to the collision. The defendants urged that such testimony is in error and especially so since eyewitness testimony was available. The most recent pronouncement by our Supreme Court concerning testimony of a reconstruction expert is found in *Plank v. Holman*, 46 Ill. 2d 465, 264 N.E. 2d 12. The court stated in the *Plank* case:

> "A similar problem exists with the testimony of the reconstruction expert. In Miller v. Pillsbury Co., 33 Ill. 2d 514, 516, 211 N.E. 2d 733, 735, this court stated 'we are of the opinion that expert testimony on reconstruction of an automobile accident should be admissible where it is necessary to rely on knowledge and application of principles of physics, engineering and other sciences beyond the ken of the average juror.' However, reconstruction testimony may not be used as a substitute for eyewitness testimony where such is available. Whether it may be used in addition to eyewitness testimony is determined by whether it is necessary to rely on knowledge and application of principles of science beyond the ken of the average juror. In this case this would be determined by the trial court after the testimony of the plaintiff as to the cause of the accident."

Following the rule set forth in *Plank* we must determine whether the opinion testimony of the reconstruction expert in the case before us was used as a substitute for eyewitness testimony or was it in addition thereto, and was necessary because certain knowledge and application of the principles of science were beyond the ken of the average juror. The record discloses that the plaintiff's expert did not reconstruct the collision itself. He offered no opinion as to speed based upon skid marks. He did not compute the angle of impact, nor did he offer opinion testimony as to the speed of the train and the speed of the truck based upon an analysis of collision damage. In fact, there was no reconstruction evidence relating to the actual collision. It is true that there were three eyewitnesses to the collision, namely, an observant truck driver and the engineer and brakeman of the train involved. However, none of these witnesses were able to assist the jury as to time and distances involved, e.g., braking time and air brake lag time. This information we believe should have been provided to the jury.

Certainly the computation of such information is beyond the ken of the average juror. We believe that the determination of the trial court to permit the plaintiff's expert to testify as to such matters was a correct determination and did not constitute error.

The trial court further admitted into evidence the Uniform Traffic Control Device Manual of Iowa and photostatic enlargements of two pages of that particular manual relating to crossbuck signs and advance warning signs at railroad crossings. Also admitted was the Federal Uniform Traffic Control Device Manual. The admission of these exhibits was objected to by the defendants. Prior to admission of the crossing protection standards of the Iowa Uniform Traffic Control Device Manual the plaintiff proved by testimony of the defendant Throckmorton that the railroad had followed the recommendations contained in this manual as standards of reasonable care as far as signing, lighting and barricading at grade crossing was concerned. It was further proved by the plaintiff that the railroad crossing protection standards were national standards and that the defendant railroad used as a standard the Federal Uniform Traffic Control Device Manual which defense counsel conceded to be identical with the Iowa manual. The trial court instructed the jury on the limited use of the manual. The trial court was correct in the admission of the exhibits for certainly they could assist the jury in determining the question of reasonable care. Such evidence was a relevant aid to the jury in deciding what was feasible and what the railroad knew or should have known concerning grade crossing protection standards. (See *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253.) The defendants contend that the code of Iowa requires only one crossbuck sign at a railroad crossing and that the manual requiring two such signs contravenes the very statute which authorized its existence. We fail to see the pertinency of such an argument since we doubt if the legislature of Iowa ever intended, if indeed it would have any right or power to deprive courts and juries of their function of determining in individual cases whether the defendants conduct measured up to the standards of reasonable care under the circumstances; and consequently the fact that statutory requirements are fully complied with does not prevent a finding by a jury that the railroad was negligent in not providing additional warnings or signals. (*Chicago G. W. R. Co. v. Kowalski*, 92 F. 310; *Mast v. Illinois C. R. Co.*, 79 F. Supp. 149.) We fail to find that the trial court was in error in admitting into evidence the manuals and photographs.

The trial court permitted the introduction of testimony to the effect that neither the defendant railroad or the defendant Loftus

who performed an engineering survey of the crossing ever notified the public authorities that the advance warning sign was missing. The defendants claimed that this testimony constitutes prejudicial error since the court by its ruling permitted the jury to believe that the defendant railroad could be found negligent either in failing to erect an advance warning sign or in failing to notify the public authorities of its absence when in fact it was a duty of the county authorities to see to the installation of such a sign. It should be noted that the trial court instructed the jury as follows:

> "Railroad companies are not required to place so-called advance warning signs on the road or highway in advance of the approach to a railroad crossing. This is solely the responsibility of the public authorities."

This instruction negates defendants' contention that the jury would be led to believe that the installation of such signs was the duty of the defendant railroad. We do not find that the trial court abused its discretion in permitting the introduction of evidence objected to. Testimony as to whether the defendant railroad notified public authorities as to the absence of an advance warning sign is admissible since it is relative to the question of due care and reasonable conduct on the part of the defendant. "Standards of prudent conduct are declared at times by courts but they are taken from facts of life * * *." *Pokora v. Wabash Ry. Co., supra.*

The trial court permitted the introduction in evidence of an intra-company letter to the defendant railroad. In this correspondence an employee of the railroad described the crossing as "a very dangerous situation," "a serious problem," "a very dangerous setup," and recommended that the railroad engineering department make a study with respect to the installation of warning signals. The defendant railroad contends that the admission of the correspondence in evidence was error in that the author of the letter was referring to and describing conditions that would confront a southbound traveler and that the decedent had been traveling north at the time of the fatal collision. We agree with the defendant that admissions as well as other types of evidence must be relevant to the issues, however, we believe that the admissions in the correspondence were relevant in that the writer was referring to the crossing in general and did not limit his views and recommendations with only southbound traffic in mind. The jury also had before it the testimony of a police officer who described the crossing from which description the jury could conclude whether it was dangerous when approached by the northbound traveler as well as one traveling south. We believe that read in its entirety there is sufficient privity between the letter and the issues to be decided by the jury to justify its admission into

evidence.

The defendants tendered an instruction which stated "that if the jury found plaintiff's decedent sufficiently familiar with the railroad crossing, that he knew or in the exercise of ordinary care should have known of its whereabouts, then he was not entitled to rely on an advance warning sign or an additional crossbuck but was obliged to exercise due care for his own safety in the light of his knowledge." This instruction was refused by the court and the defendants allege error. "Instructions are to be given in clear and intelligent language and inform the jury what the issues are, the principles of law applicable to be observed and the facts material to be proven to justify their verdict." *(Smith v. City of Rock Island,* 22 Ill. App. 2d 389, 161 N.E. 2d 369.) The instruction tendered by the defendants failed to meet the criteria set forth in the *Smith* case in that it did not clearly set forth the issues, but had the effect, if given, of permitting the defense to argue its case through the use of an instruction. The trial court did not err in refusing this instruction.

Lastly the defendants contend that the jury's verdict is excessive and should not be permitted to stand. The verdict returned by the jury was in the amount of $449,757.00 and is acknowledged by both the plaintiff and defendants to be the largest death verdict ever returned under Iowa law. It is true that the decedent was but 37 years of age, well employed, conscientious, responsible and left surviving him a wife and four minor children, yet we cannot reconcile the amount of the verdict with any accepted standards of computing damages or loss of support. The interest yield alone on the investment of such a sum would far exceed the actual or anticipated earnings of the decedent. After a careful analysis of the verdict we can only conclude that it is excessive. We therefore find that there should be a remittitur in the amount of $199,757.00, and if the plaintiff-appellee will file a remittitur in this court on or before thirty days from the date of the receipt by counsel for plaintiff-appellee of a certified copy of this opinion, judgment will then be entered in this case in the sum of $250,000.00; otherwise said case is remanded to the circuit court of Rock Island County for a new trial.

Affirmed upon remittitur, otherwise reversed and remanded.

ALLOY, P. J., and STOUDER, J., concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEVA ADKINS, Administratrix of the Estate of EVERETT ADKINS, deceased,

Plaintiff,

-vs-

THE HON. ROBERT C. UNDERWOOD;
THE HON. WALTER V. SCHAEFER;
THE HON. DANIEL P. WARD;
THE HON. JOSEPH H. GOLDENHERSH;
THE HON. THOMAS E. KLUCZYNSKI;
THE HON. HOWARD C. RYAN;
THE HON. CHARLES H. DAVIS;
THE HON. DAN H. McNEAL; and
THE HON. CHARLES J. SMITH,

Defendants.

No. 73 C 2558

MEMORANDUM OPINION AND ORDER

This cause comes on the defendants' motion to dismiss the complaint for want of jurisdiction and for failure to state a claim upon which relief can be granted.

This is an action seeking to redress the alleged deprivation of the plaintiff's civil rights as guaranteed by Article IV and the Fourteenth Amendment to the United States Constitution and protected by 42 U.S.C. § 1983.

This Court allegedly has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

The plaintiff, in the complaint, alleges, *inter alia*, the following facts:

1. The plaintiff Leva Adkins is a citizen of the United States and a resident of the State of Michigan.

2. Defendants, The Honorable Robert C. Underwood, The Honorable Walter V. Schaefer, The Honorable Daniel P. Ward, The Honorable Joseph H. Goldenhersh, The Honorable Thomas E. Kluczynski, The Honorable Charles H. Davis, The

Honorable Howard C. Ryan are and were at all times relevant to this complaint residents of the State of Illinois, and Judges of the Supreme Court of the State of Illinois; and defendents, The Honorable Dan H. McNeal and The Honorable Charles J. Smith are and were residents of the State of Illinois, and Judges of the Circuit Court of the County of Rock Island, State of Illinois.

3. On January 16, 1968, as administratrix of her husband's estate, the plaintiff filed a civil action in the Circuit Court of Rock Island County, in the State of Illinois, against the Chicago, Rock Island & Pacific Railroad Company, a Delaware corporation, doing business in Illinois, for damages resulting from the death of her husband when the tractor trailer he was driving was struck by a defendant's train at a railroad crossing in Booneville, Iowa. Plaintiff, as administratrix of her husband's estate, had on October 18, 1966, filed a civil action in the Federal District Court for the Southern District of Iowa, Central Division, against the Chicago, Rock Island & Pacific Railroad Company for damages arising out of her husband's death. However, on November 9, 1967, plaintiff and defendant in that action stipulated to dismissal without prejudice and the case was ordered dismissed without prejudice in the Federal District Court in accordance with Rule 41 (a)(i) (ii) of the Federal Rules of Civil Procedure.
4. On May 14, 1968, plaintiff moved to amend her complaint to add as defendants three employees of the railroad, W. B. Throckmorton, W. B. Johnson, and R. V. Loftus, all residents of Illinois. On August 12, 1968, that motion was granted by defendant McNeal, trial judge for the action. Plaintiff dismissed her complaint against defendant Johnson only on December 18, 1968. On August 12, 1968, defendant McNeal, trial judge for the action, denied the motion of the defendant railroad for dismissal for *forum non conveniens.* Defendants Throckmorton and Loftus have never agreed to submit to service of process in Iowa, or any forum other than Illinois; never requested dismissal for *forum non conveniens;* and in fact, there was no forum other than Illinois in which they could have been sued by plaintiff. The case proceeded to trial, and the jury returned a verdict for plaintiff against all defendants in the amount of four hundred forty-nine thousand seven hundred fifty-seven ($449,757) dollars.
5. The Appellate Court of the State of Illinois ordered a remittitur in the sum of one hundred ninety-nine thousand seven hundred fifty-seven ($199,757) dollars, and unanimously affirmed the judgment of two hundred fifty thousand ($250,000)

dollars for plaintiff against all defendants.

6. On May 14, 1974, the Supreme Court of the State of Illinois reversed the verdict of the trial court and the Appellate Court in the action, on the grounds of *forum non conveniens* concluding, without a hearing on the issue, that plaintiff had joined the individual defendants in bad faith solely to gain access to the Courts of Illinois, and remanded the case to the trial court, with instructions to grant the defendant railroad's motion to dismiss for *forum non conveniens.* The Court in its opinion allegedly attached prejudice to plaintiff's earlier dismissal of a similar case upon order of the Federal Court that it was to be without prejudice. The Court denied rehearing on September 27, 1973[1]

7. If dismissal is entered by Judge McNeal or Judge Smith, defendants herein, plaintiff will be denied such access to the Illinois court as is available to the citizens of Illinois allegedly in violation of the privileges and immunities clause of the Constitution of the United States (Article IV, Section 2) and denied the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution. If the motion to dismiss is granted, plaintiff will allegedly be denied the due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States in that:

   a. plaintiff has never had an adversary hearing on the question of her good faith in suing the individual defendants or on the convenience of an alternate forum; and
   b. If the case is dismissed, plaintiff will be forced to retry a case which has already been tried at great cost to her in time and money before a court of competent jurisdiction, she will again be forced to expend that time and money and will not be able to sue the two individual defendants.

8. Since the case has been heard by the highest Illinois court, plaintiff is without an adequate remedy at law. Plaintiff applied for rehearing by the highest Illinois court and rehearing was denied.

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1. See Adkins v Chicago, Rock Island & Pacific Railroad Co., Ill. 2d 301 N.E. 2d 729 (1973).

9. If the motion to dismiss is granted, plaintiff will allegedly suffer immediate and irreparable injury in that:
   a. she will be unable to proceed against the individual defendants as there is no forum other than Illinois in which they can be sued;
   b. she will be forced to relitigate issues which have already been adjudicated in a court of competent jurisdiction; and
   c. the decision is further violative of Federal law in that the Illinois Supreme Court attaches prejudice to the dismissal ordered to be without prejudice by the Federal District Court in Iowa.
10. Plaintiff asks this Court to issue a temporary restraining order and preliminary injunction directing that defendants McNeal and Smith not grant the motion to dismiss in the State of Illinois Civil Action titled *LEVA ADKINS, as Administratrix Of the Estate of Everett Adkins, deceased vs. CHICAGO, ROCK ISLAND & PACIFIC RR CO. et al.*, and reinstate the judgment of the Appellate Court in the State of Illinois in that action; and upon final hearing of this cause, a declaratory judgment and permanent injunction be entered by this Court;
    a. declaring that the action by the defendant Illinois Supreme Court judges in ordering dismissal of the above case was unconstitutional as violating plaintiff's rights under Article IV, Section 2 and the Fourteenth Amendment, Section 1 of the United States Constitution; and
    b. permanently enjoining defendants from ordering the case dismissed or dismissing the case and directing them to reinstate the judgment below.

The defendants, in support of their motion to dismiss, contend that:

1. This Court lacks jurisdiction to act as a court of direct review for judgments rendered by the Illinois Supreme Court.
2. The plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983.
3. The defendants are all Justices of the Illinois Supreme Court and Judges of the Circuit Court of Rock Island County and are immune from suit based on their activities performed in the course of their judicial duties.
4. The action is barred by collateral estoppel.
5. There is an absence of indispensable parties to this action.

The plaintiff, in opposition to the instant motion, contends

that this Court has jurisdiction over the instant controversy and that the allegations in the complaint are sufficient to adequately state a cause of action.

I. THE PLAINTIFF IN THE COMPLAINT FAILS TO ADEQUATELY STATE A CLAIM UNDER 42 U.S.C. s 1983 ON WHICH RELIEF CAN BE GRANTED.

This is not an action to enjoin a proceeding pending in a state court. This is an action to enjoin the enforcement of a final judgment rendered by the highest court of the State of Illinois. This is not an action to enjoin prosecutors or other state officials from further state court proceedings. It is an action to review the validity of judicial actions performed within the judicial actions assigned by state law.

Whether or not there may be circumstances in which an injunction may lie to prevent or preclude judges from performing their official functions, there is no authority whatsoever to suggest, as is suggested in the instant action, that they may be called to account, by way of either legal or equitable relief, for the propriety of judgments that they have already rendered. See *Brown v. Dunne*, 409 F. 2d 341 (7th Cir. 1969).

The doctrine of judicial immunity is not for the protection or benefit of a malicious or corrupt judge but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feeling in the litigants. Since a judge is just as human as those he judges, his errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may pursue him with litigation charging malice, corruption or deprivation of civil rights. To impose such a burden on judges would not contribute to just and fearless decision-making but to decisions made under the veil of intimidation. *Pierson v. Ray* 386 U.S. 547 (1967).

The Civil Rights Act of 1871, 42 U.S.C. s 1983, creates no claim that may be asserted against judges acting within their judicial capacities in order to destroy a final judgment of a state court. *Brown v. Dunne, supra; Gross v. State of Illinois*, 312 F. 2d 257 (7th Cir. 1963); S. *Kolnich v. Spolar*, 317 F. wd 847 (7th Cir. 1963).

By commencing this civil rights suit in federal court after the adverse ruling of the Illinois Supreme Court and before the United

States Supreme Court has had an opportunity to rule on this matter, the plaintiff seeks to thwart the final state court judgment by relitigating in a trial *de novo* the very issues that had been litigated in the state trial court and on appeal. If this newly proposed appellate procedure is permitted, many state civil cases will not only face chaos but also uncertainty and unenforceability. Mere errors and irregularities occurring in a judicial proceeding are to be differentiated from a situation wherein the proceeding itself is a sham or nullity. *Sarelas v. Sheehan*, 326 F. 2d 490 (7th Cir. 1963), cert. denied 377 U.S. 932 (1964). The federal courts and the federal civil rights acts do not guarantee a citizen against the loss of a private civil action due to alleged irregularities such as in the instant action in the state court trial and appeal. It is clear that the instant complaint fails to state a proper cause of action because the defendant judges are immune from the instant action because they were merely performing their official judicial duties.[2]

II. THIS COURT LACKS JURISDICTION TO ACT AS A COURT OF ERRORS AND APPEALS TO REVIEW THE JUDGMENT OF A STATE SUPREME COURT.

It appears that the plaintiff in the instant action is seeking to have this Court review the propriety of the judgment of the Illinois Supreme Court, to reverse that judgment and to reinstate the judgment of an intermediate Illinois Appellate Court. This Court is not authorized or competent to perform the function of reviewing state court decisions.

While lower federal courts were given certain power in the Judiciary Act of 1789, they were not given any power to directly review cases from state courts, and they have not been given such powers since that time. *Atlantic Coast Line Railroad Co. v. Engineers*, 398 U.S. 281 (1970). Only the Supreme Court is authorized to review on direct appeal the decision of state courts. From the beginning this country has had two essentially separate legal sy-

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[2] The instant action is clearly distinguishable from the case of *Mitchum v. Foster*, 407 U.S. 225 (1972) which the plaintiff heavily relies on. In the instant case, there is no state statute allegedly unconstitutional "on its face"; there is no allegation of bad faith or harrassment; the state suit is not a criminal proceeding which by its nature could result in a "chilling effect" on First Amendment rights. The instant state suit was initiated by the plaintiff. Further, there is no pending state proceeding which can be enjoined. The plaintiff in the instant action comes to this court seeking to reverse or to avoid or to nullify a final judgment from the highest state court in Illinois in a civil action

stems. Each system, federal and state, proceeds independently of the other with ultimate review in the United States Supreme Court of federal questions raised in either system.

Even if a state court decision is constitutionally wrong, that does not make the judgment void, it merely leaves it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than the United States Supreme Court can entertain a proceeding to reverse or modify a state court judgment which is in error. Rooker v Fidelity Trust Co., 263 U.S. 413 (1923).

Accordingly, it is hereby ordered that the defendants' motion to dismiss is granted and the cause is dismissed.

ENTER: William J. Bauer
JUDGE

DATED: January 16, 1974.

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1250

LEVA ADKINS,

Plaintiff-Appellant,

v.

THE HONORABLE ROBERT C. UNDERWOOD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 73-2558-C
WILLIAM J. BAUER, *Judge*

ARGUED NOVEMBER 21, 1974 — DECIDED JULY 17, 1975

Before FAIRCHILD, *Chief Judge*, PELL, *Circuit Judge*, and WYZANSKI, *Senior District Judge**.

PER CURIAM. Plaintiff brought this civil rights action under 42 U.S.C. §1983 against the seven justices of the Supreme Court of Illinois and two judges of the Circuit Court of the County of Rock Island, Illinois. Federal jurisdiction is asserted under 28 U.S.C. §§1331 and 1343. Plaintiff's complaint seeks no damages, but asks declaratory and injunctive relief to reinstate a favorable verdict plaintiff had won in the Illinois Circuit Court, but which had been set aside on appeal. On defendant's motion, the district court dismissed the complaint for lack of jurisdiction and failure to state a claim. For the reasons set forth below, we affirm.

* Senior District Judge Charles E. Wyzanski, Jr. of the District of Massachusetts is sitting by designation.

Plaintiff, a resident of Michigan, filed a civil action in a federal district court in Iowa on October 18, 1966 against the Chicago, Rock Island & Pacific Railroad Company for damages arising out of her husband's death in an accident that occurred in Iowa. On November 6, 1967 this case was dismissed without prejudice pursuant to a stipulation agreed to by the parties. On January 16, 1968 plaintiff brought a similar action against the railroad in the Circuit Court of Rock Island County, Illinois.

In March 1968 the railroad moved to dismiss on the ground of forum non conveniens. Prior to a ruling on the motion, plaintiff amended her complaint naming three railroad employees, who were residents of Illinois, defendants. The trial judge denied the forum non conveniens motion on August 12, 1968. The case proceeded to trial, and the jury returned a verdict for plaintiff in the amount of $449,757. Both the railroad and the individual defendants raised the forum non conveniens issue in their post-trial motions.

On appeal, the Illinois Appellate Court ordered remittitur of $199,757, but in all other respects, including the denial of the forum non conveniens motion, affirmed plaintiff's judgment.[1]

After granting leave to appeal, the Supreme Court of Illinois reversed, holding that the forum non conveniens motion should have been granted, and remanded the case with directions to dismiss the action.[2]

The Court reviewed matters of record with respect to the Iowa and the Illinois actions and concluded "All of the factors normally considered thus point to the conclusion that Rock Island County is not an appropriate forum for the trial of this case." The Court considered the joinder of the two individual defendants, the third having been dismissed. The Court pointed out that they were added four months after the Illinois action was commenced, that "It seems apparent that the individual defendants were joined in order to make the Illinois action look different

[1] *Adkins v. Chicago, Rock Island & Pacific R.R. Co.*, 2 Ill. App.3d 906, 274 N.E.2d 507 (1971).

[2] *Adkins v. Chicago, Rock Island & Pacific R.R. Co.*, 54 Ill. 2d 511, 301 N.E.2d 729 (1973).

from the Iowa action, and thereby provide some sort of basis upon which the denial of a motion to dismiss could be predicated," and that it was not clear as a matter of substantive law that persons occupying their positions are liable in tort for injuries such as caused the death of plaintiff's decedent. The Court concluded, "We are not convinced that the individual defendants were joined with probable cause and in good faith for the purpose of obtaining a judgment against them." Stating and applying a state rule, the Court decided to dismiss.

Plaintiff then filed a petition for rehearing contending that plaintiff had no hearing on the forum non conveniens issue nor on the issue of her good faith, and that the Supreme Court's decision violated the due process clause of the Fourteenth Amendment and the privileges and immunities clause of Art. IV, §2 of the United States Constitution. The Supreme Court of Illinois denied this petition without oral argument. Plaintiff did not seek certiorari in the Supreme Court of the United States but chose to file the instant action in federal district court renewing her constitutional claims.

At the outset we note that if plaintiffs are permitted to bring suits of this ilk under the guise of the civil rights statutes, the relationship between state and federal courts will be radically altered. Plaintiff is asking an inferior federal court to order the Supreme Court of Illinois to vacate its judgment and reinstate a favorable trial court verdict and judgment.[3] Granting such relief would inter-

[3] Plaintiff's prayer for relief requests:

WHEREFORE, plaintiff prays that:

1. This Court issue a Temporary Restraining Order and Preliminary Injunction directing that defendants McNeal and Smith not grant the motion to dismiss in the State of Illinois Civil Action titled LEVA ADKINS, as Administratrix of the Estate of Everett Adkins, deceased vs. CHICAGO, ROCK ISLAND & PACIFIC RR CO, et al, and reinstate the judgment of the Appellate Court of the State of Illinois in that action.

2. Upon final hearing of this cause, a Declaratory Judgment and Permanent Injunction be entered by this Court:

a. declaring that the action of the defendant Illinois Supreme Court judges in ordering dismissal of the above case was unconstitutional as violating plaintiff's rights under Article IV, Section 2 and Amendment XIV, Section 1 of the United States Constitution;

b. permanently enjoining defendants from ordering the case dismissed or dismissing the case and directing them to reinstate the judgment below.

3. Plaintiff be granted such other relief as to this Court shall appear appropriate and necessary.

fere with discretion at the heart of the state court decision-making process, jeopardizing the repose of state court judgments as well as offending firmly-held notions of comity. For these reasons alone equitable relief may well be inappropriate. *See generally O'Shea* v. *Littleton*, 414 U.S. 488, 499-501 (1974).

Orchestrating this theme, defense counsel has argued that federal courts lack jurisdiction to hear plaintiff's claim,[4] that the doctrine of judicial immunity bars suit,[5] and that the doctrine of res judicata precludes our review of the Illinois court's decision.[6] Whatever the limits on the power of federal courts to compel state court judges to modify or rescind their decisions, we need not address these thorny issues for we agree that plaintiff's complaint fails to state a claim upon which relief can be granted.

Plaintiff predicates her 1983 claim upon two alleged constitutional violations. First, she argues that she has been denied due process. Specifically, she contends that a hearing must be held on the questions of the convenience of alternative forums and her good faith in joining the Illinois residents as defendants. Apparently there was no evidentiary hearing devoted to these matters. Yet the forum non conveniens issue was argued at each stage of the litigation, the Supreme Court decided the issue on the facts of record before it, and plaintiff makes no claim that she was deprived of a full opportunity to put into that record any other facts in the circuit court relevant to this issue. If it be true that with respect to the question of plaintiff's good faith in joining the individual defendants, the Illinois court concluded that in the light

[4] *See Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Paul* v. *Dade County, Florida*, 419 F.2d 10, 12-13 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970). *But see Brown* v. *Chastain*, 416 F.2d 1012, 1017-23 (5th Cir. 1969) (Rives, J., *dissenting*).

[5] *Compare, Cheramie* v. *Tucker*, 493 F.2d 586, 588-89 (5th Cir. 1974), *cert. denied*, 43 L.W. 3212 (U. S. October 15, 1974), *with Littleton* v. *Berbling*, 468 F.2d 389, 406-08 (7th Cir. 1972), *rev'd on other grounds sub nom., O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

[6] *See e.g., Francisco Enterprises, Inc.* v. *Kirby*, 482 F.2d 481, 485 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); *Lackawanna Police Benevolent Association* v. *Balen*, 446 F.2d 52, 53 (2d Cir. 1971) (*per curiam*); *Goss* v. *State of Illinois*, 312 F.2d 257, 259 (7th Cir. 1963). *But see Preiser* v. *Rodriquez*, 411 U.S. 475, 509, n.14 (1973) (*Brennan, J., dissenting*); *Florida State Board of Dentistry* v. *Mack*, 401 U.S. 960, 961 (1971) (White, J., *dissenting from denial of cert.*).

of the facts of record plaintiff had, and failed to discharge the burden of proving good faith, there is nothing in the complaint to show that this conclusion was invidiously motivated, nor that reaching it was otherwise outside the legitimate scope of the judicial decision-making process.

Moreover, plaintiff made use of her opportunity to file a petition for rehearing and argued her present constitutional claim in that petition. She had a full hearing on her case at trial and on appeal, and her present objection can only be that the Illinois court erred in its evaluation of the facts before it.

Even if it can be said that the Supreme Court of Illinois erred in judgment, "mere errors and irregularities are not sufficient to show a purposeful conspiracy to deny due process." *Skolnick* v. *Spolar*, 317 F.2d 857, 859 (7th Cir. 1963), *cert. denied*, 375 U.S. 904; *Brown* v. *Dunne*, 409 F.2d 341, 343 (7th Cir. 1969), and there are no allegations that the Supreme Court of Illinois proceedings were a sham or that the justices invidiously used their office to deprive plaintiff of her rights. *Delia* v. *Court of Common Pleas of Cuyahoga County*, 418 F.2d 205, 206 (6th Cir. 1969), *cert. denied*, 396 U.S. 886; *Sarelas* v. *Sheehan*, 326 F.2d 490, 491-92 (7th Cir. 1963), *cert. denied*, 377 U.S. 932 (1964). Absent such averments, the complaint does not present a deprivation of federally protected rights.[7]

The second constitutional peg on which plaintiff purports to hang her 1983 claim is the privileges and immunities clause of Art. IV, §2. She asserts that the decision of the Supreme Court of Illinois denied her accecss to the Illinois courts on the same footing as Illinois citizens.

We agree that the privileges and immunities clause forbids certain discriminations on the basis of state citizenship. *Blake* v. *McClung*, 172 U.S. 239 (1898). But, here, plaintiff's cause was dimissed not because she was a citizen of another state, but because, in the Illinois

[7] We think that in any event, where seemingly regular state judicial proceedings are under attack, mere conclusionary statements should be held insufficient.

court's view, the circumstances made an Illinois forum inappropriate and plaintiff's joinder of the Illinois defendants was a mere subterfuge to legitimate her choice of forum. Other cases demonstrate, indeed, that the Illinois court follows a well-established policy of allowing nonresident access to Illinois courts and of evenhanded application of the forum non conveniens doctrine.[1] Under these circumstances, we cannot say that the state's implementation of its procedural policy presents a federal constitutional question. *Missouri* v. *Mayfield*, 340 U.S. 1, 3 (1950).

The plaintiff's complaint on its face fails to make an adequate claim of deprivation of constitutional rights.

Accordingly, the judgment appealed from is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[1] The state reports contain numerous statements declaring free access to Illinois courts for nonresidents. *See, e.g., Winterstein* v. *Nat. Cooperage Co.*, 361 Ill. 95, 101-02, 197 N.E. 578, 582 (1935):

> Neither does the fact that the plaintiff is a non-resident deprive him of his remedy in the courts of this State. There is no statute in this State denying redress of grievances by reason of non-residence. The policy of our State has always been to permit persons, regardless of residence, to bring suits in our courts. Citizenship has never been a condition precedent to sue in our courts.

Accord, James v. *Grand Trunk West. R.R. Co.*, 14 Ill. 2d 356, 362, 152 N.E.2d 858, 862 (1958), *cert. denied*, 358 U.S. 915; *People* v. *Graber*, 397 Ill. 522, 524-25, 74 N.E.2d 865, 866 (1947); *Miller* v. *Yellow Cab Co.*, 308 Ill. App. 217, 232-33, 31 N.E.2d 406, 409 (1941).

Consistent with this policy, Illinois courts have not used the forum non conveniens doctrine to restrict nonresident access to Illinois courts. *Cotton* v. *Louisville & Nashville R.R. Co.*, 14 Ill. 2d 144, 152 N.E.2d 385 (1958); *Bargerozy* v. *Meneghini*, 8 Ill. App.2d 285, 131 N.E.2d 792 (1956) (nonresident plaintiffs prevailed on motion to dismiss). *See also Whitney* v. *Madden*, 400 Ill. 185, 188-90, 79 N.E.2d 593, 594-95 (1948), *cert. denied*, 335 U.S. 828.

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

Dec. 8, 1975

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RE ADKINS v. UNDERWOOD, ET AL., 75-572

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

cc: Fred F. Herzog, Esq.
1st Asst. Atty. Gen of
Illinois
Suite 800
160 N. LaSalle St.
Chicago, IL. 60601

Very truly yours,

Michael Rodak, Jr., Clerk
By
Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

Philip B. Kurland, Esq.
Spec. Asst. Atty. Gen of Illinois
c/o Rothschild, Barry & Myers
Two First Nat'l Plaza
Chicago, IL. 60603

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT ROCK ISLAND COUNTY, ILLINOIS GENERAL DIVISION

LEVA ADKINS, Administratrix of the Estate of EVERETT HARMON ADKINS, Deceased,

Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, R. V. LOFTUS and W. B. THROCKMORTON,

Defendants.

No. 68 L 69

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY GENERAL DIVISION
OCT 14 1975
Clerk of the Circuit Court

ORDER OF DISMISSAL IN CONFORMANCE WITH MANDATE OF SUPREME COURT

Pursuant to Mandate of Supreme Court dated October 10, 1973, the motion to dismiss is granted.

Dated: Oct. 14, 1975

ENTER:

JUDGE

LIBRARY
FEB 10

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 75 979

OCTOBER TERM, 1975

LEVA ADKINS, Administratrix of the Estate of EVERETT ADKINS, Deceased,
Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
Respondents.

MOTION TO DISMISS

With Supporting Brief; and Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Illinois

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II. Petitioner has had an adequate hearing and Illinois' well-established policy of allowing non-residents access to Illinois Courts and of even-handed applications of the doctrine of forum non conveniens has been adjudicated by the federal courts. Thus, there is no substantial question presented, but only a question of state law 9

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 75 979

OCTOBER TERM, 1975

LEVA ADKINS, Administratrix of the Estate of EVERETT ADKINS, Deceased,
Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
Respondents.

MOTION TO DISMISS

With Supporting Brief; and Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION TO DISMISS

Respondents move that the Petition for Writ of Certiorari to the Supreme Court of Illinois be dismissed, pursuant to Rule 16, as not having been filed within ninety days from the entry of the final Judgment or Decree, as required by 28 USC 2101.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The opinion of the Supreme Court of Illinois in this case was filed June 4, 1973 and appears at 54 Ill. 2d 511, 301 NE2d 729. Rehearing was denied on September 27, 1973.

The Supreme Court of Illinois issued its mandate directing that the case be dismissed on October 10, 1973. That was the final Judgment or Decree from which the ninety-day period for filing a Petition for Writ of Certiorari to this Court began to run. (See Appendix).

The first Petition herein asserted that her Petition sought to review a Judgment of the Supreme Court of Illinois entered June 4, 1973. Her second or substituted Petition, asserts she seeks review of a Judgment of the Supreme Court of Illinois entered October 19, 1975. The correct date of the Judgment of the Supreme Court of Illinois is the date of the mandate, the Final Order, dated October 10, 1973. Her Petition is, therefore, not timely.

Petitioner asserts that on October 26, 1973 the United States District Court entered an Order pursuant to Stipulation precluding the entry of Judgment in the Circuit Court of Rock Island County, Illinois until the final determination of threshold jurisdictional questions was determined by the collateral civil rights litigation instituted by the Petitioner against the Justices of the Court of Illinois (herein referred to as *Adkins v. Underwood*). That Stipulation did not involve the Respondents here. (See Appendix).

The stay of the entry of the Judgment in the Illinois Circuit Court (Trial Court), however, did not stay the time for filing a Petition for Writ of Certiorari under 28 USC 2101. Under that statute, a Petition for Writ of Certiorari intended to bring any judgment or decree in a civil action before the Supreme Court for review shall be taken within ninety days after the entry of the final order, judgment, or decree.

In determining what is a final judgment or decree within the meaning of the Federal statute, this Court is controlled not by the designation applied to it in the State practice, but by

Federal law. *Cole v. Violette*, 319 US 581; *Department of Banking v. Pink*, 317 US 264; *Gorman v. Washington University*, 316 US 98.

The final Judgment in this case was either the denial of rehearing by the Supreme Court of Illinois on September 27, 1973, or the issuance of the mandate on October 10, 1973. The filing of a Judgment dismissing the case in the Circuit Court is a mere ministerial act which cannot effect the time for filing a Petition for Writ of Certiorari.

Directly in point is *Cole v. Violette, supra.* In that case the Supreme Judicial Court of Massachusetts on December 4, 1942, ruled that the case had become moot. (312 NE2d 400).

On the same day that Court sent to the Superior Court from which the appeal was taken a rescript which ordered the Clerk of that Court to enter a final Decree that the case was dismissed. The rescript was filed in the Superior Court on the same day, December 4, 1942, which on January 7, 1943, entered a Decree as had been directed by the Supreme Court. Applications for allowance of an appeal to this Court presented within three months after December 4 were denied, but an application presented to another Associate Justice of this Court on March 6 was allowed. This Court then states:

> "* * * But this last application was not timely if the time to take an appeal ran from December 4th. *Matton Steamboat Co. v. Murphy*, 319 U.S. 412.
>
> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the 'final decree' in the case. See *Boston v. Santosuosso*, 308 Mass. 189, 194, 31 N.E.2d 564; *Carilli v. Hersey*, 303 Mass. 82, 84, 20 N.E.2d 492. But in determining what is a final judgment or decree within the mean-

ing of § 237 of the Judicial Code, 28 U.S.C. § 344, we are not controlled by the designation applied to it in state practice. *Department of Banking v. Pink*, 317 U.S. 264, 268; *Gorman v. Washington University*, 316 U.S. 98, 101. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was not applied for within the time provided by law. * * *"

To the same effect is *Department of Banking of Nebraska v. Pink*, 317 US 264, where this Court held that a Petition for Writ of Certiorari had not been timely filed. In that case this Court went on to caution the Bar in regard to this practice, stating:

"Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton v. Fowler*, 91 U.S. 142, 146. In reliance upon the early decision in Green v. Van Buskerk, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order

of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 U.S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts v. Hoagland*, 105 U.S. 701, 702, and *Clark v. Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here.

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick v. Superior Court*, 278 U.S. 575; *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Comm'n.*, post, p. 588), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court (see *Gorman v. Washington University*, 316 U.S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

> "It was for this reason that we recently held that the three-months requirement had not been complied with in *Monks v. Lee*, post, p. 590, and *Bunn v. Atlanta*, post, p. 666, in which cases judgments were brought here for review from the courts of California and Georgia and in each of which a Petition for rehearing is today denied, post, p. 711. The petition for certiorari in this case must likewise be denied for want of jurisdiction."

The situation is identical here. The Order of the Supreme Court of Illinois is incorporated in its mandate of October 10, 1973. That was the Order which finally disposed of all of the issues in the case, leaving nothing to be done but the ministerial act of entering Judgment in the Trial Court. The stay of the Judgment in the Trial Court by the United States District Court in *Adkins v. Underwood*, a collateral civil rights proceeding cannot effect the time for appeal or for filing a Petition for Writ of Certiorari in this Court.

If there can be any further doubt that the mandate of the Supreme Court of Illinois issued on October 10, 1973 is the "appealable order" in this case, it should be noted that the United States District Court for the Northern District of Illinois, Eastern Division, in its Memorandum Opinion and Order dismissing *Adkins v. Underwood*, stated: "This is not an action to enjoin a proceeding pending in a state court. This is an action to enjoin the enforcement of a *final judgment* rendered by the highest Court of the State of Illinois." (Emphasis supplied). (Pet , p. 49).

The United States Court of Appeals for the Seventh Circuit, in affirming that Order, stated in its opinion: "Plaintiff is asking an inferior federal court to order the Supreme Court of Illinois to vacate its *judgment* and reinstate a favorable trial court verdict and judgment." (Emphasis supplied). (Pet., p. 55).

The Petitioner has by her own choice and that of her counsel pursued for more than two years an elusive remedy claiming a violation of Petitioner's civil rights under 42 USC 1983, instead of filing a Writ of Certiorari to this Court after the Judgment of the Supreme Court of Illinois was filed.

Under the circumstances, she is now too late to pursue this remedy. Her Petition must be dismissed or denied for want of jurisdiction, not having been applied for within the time provided by law.

REASONS FOR DENYING THE WRIT

I

The Questions Presented by Petitioner's Petition for Writ of Certiorari Are *Res Judicata*, Having Been Determined by Adkins v. Underwood, 270 F Supp. 510 (N.D. Ill. 1974) Aff. 520 F2d 890 (C.A. 7th 1975); Cert. Denied No. 75-572 (Dec. 8, 1975).

Whether it be deemed *res judicata* or estoppel, the plain fact is that the Petitioner has already presented the questions here raised in her appeal to the Seventh Circuit and her Petition for Writ of Certiorari to this Court in *Adkins v. Underwood*, 520 F2d 890, cert. denied No. 75-572 (Dec. 8, 1975). This Petition was nothing more than a second attempt to persuade this Court to take jurisdiction on the same issues.

Petitioner here raises two issues: That Petitioner has been denied privileges guaranteed by Article IV, § 2 of the Constitution; and that she has been denied due process by being denied a hearing on *forum non conveniens*. The only difference between these contentions and those made before the Court of Appeals in the collateral litigation is that here they are presented in reverse order. The Court of Appeals stated Petitioner's contentions in *Adkins v. Underwood, supra*, as follows:

> "Plaintiff predicates her 1983 claim upon two alleged constitutional violations. First, she argues that she has been denied due process. Specifically, she contends that a hearing must be held on the questions of the convenience of alternative forums and her good faith in joining the Illinois residents as defendants." (Petitioner's Pet., p. 56); and
>
> "The second constitutional peg on which plaintiff purports to hang her 1983 claim is the privileges and immunities clause of Article IV, § 2. She asserts that the

> decision of the Supreme Court of Illinois denied her access to the Illinois courts on the same footing as Illinois citizens." (Petitioner's Pet., p. 57).

These are the same contentions that Petitioner makes in her Petition here. They have been adjudicated. The Court's attention is invited to Petitioner's Petition for Writ of Certiorari in *Adkins v. Underwood,* which show the same issues raised. Certiorari has already been denied. She is not entitled to relitigate these issues.

II

Petitioner Has Had an Adequate Hearing and Illinois' Well-Established Policy of Allowing Non-Residents Access to Illinois Courts and of Even-Handed Applications of the Doctrine of *Forum Non Conveniens* Has Been Adjudicated by the Federal Courts. Thus, There Is No Substantial Question Presented, But Only a Question of State Law.

Petitioner repeatedly asserts that she has been denied a hearing on the question of the proper *forum* and has thus been denied due process. This is not the case. The defendant Railroad filed a Motion to Dismiss the Illinois action on the doctrine *of forum non conveniens* on March 15, 1968. The docket entries reveal that the hearing on this Motion was postponed on several occasions at the request of plaintiff's counsel. The docket entries of the Rock Island County Circuit Court also show that on August 12, 1968 (Plaintiff's) Motion for Leave to Amend to Bring Two Additional Defendants was granted *nunc pro tunc.* On the same date, August 12, 1968, the docket contains the following entry: "Motions to Dismiss filed 3-15-68. *Heard and denied.* See Ord. DHM." (Emphasis supplied). The initials "DHM" on the docket are those of Dan H. McNeal, Circuit Judge of Rock Island County, Illinois, one of the defendants in *Adkins v. Underwood.* (See Appendix).

It thus appears that there was in fact a hearing on the doctrine of *forum non conveniens* where counsel for both parties were represented.

The entire record is replete with all of the indicia for a decision on *forum non conveniens* under the doctrine of *Gulf Oil Corp. v. Gilbert*, 330 US 501 (1947). The place of accident, the residences of all of the witnesses and parties, the conditions of the trial and appellate dockets, the location of records, the residences of trial counsel and all other matters were known to Judge McNeal, and to the Supreme Court of Illinois, in deciding the Illinois doctrine of *forum non conveniens*. (See Affidavits attached to Defendants' Motion printed in Appendix).

Respondents' post-trial motions raised the question of *forum non conveniens* both on behalf of the Railroad and the Respondents, Throckmorton and Loftus. The matter was fully briefed and argued by both parties and all of the necessary indicia set forth in the record before the Illinois Appellate Court. The matter was again briefed and argued before the Illinois Supreme Court.

Counsel for Petitioner frankly stated in oral argument to the Supreme Court of Illinois that he did not like the Ruling of Judge Roy L. Stephenson, United States District Judge (now Judge for the Court of Appeals, Eighth Circuit) on a Motion in Limine to restrict introduction of evidence made on the eve of the trial in Federal Court in Des Moines. It was for that reason that Petitioner moved for continuance of that trial, which was resisted by the Respondent Railroad.

Petitioner's assertion (Pet. p. 4) that it "was agreed by both parties that the (Federal) suit should be discontinued" constitutes twisting of the record. Petitioner's counsel requested Respondent's counsel to sign a Stipulation for Dismissal without prejudice of that case, as at that stage it could only be dismissed

on Stipulation or by Motion. Respondents' counsel complied, being glad to dispose of a half million dollar lawsuit against their clients.

CONCLUSION

Petitioner has been accorded a hearing and due process on the question of *forum non conveniens*, which is a question of Illinois State law. This Court has denied certiorari once in this matter, and should do so again. Actually, this matter should be disposed of on Respondents' Motion to Dismiss and an Order entered indicating the reasons for the dismissal.

Respectfully submitted

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WILLIAM M. WALKER
Rock Island, Illinois

Attorneys for Respondents

Dated: Des Moines, Iowa, February 9, 1976

APPENDIX

APPENDIX A

In the Circuit Court of the Fourteenth Judicial Circuit
Rock Island County, Illinois
General Division

Leva Adkins, Administratrix of the Estate of Everett Adkins, Deceased, Plaintiff,

vs.

Chicago, Rock Island and Pacific Railroad Company, Defendant.

No. 68 L 69.

Motion to Dismiss

Defendant, Chicago, Rock Island and Pacific Railroad Company, respectfully moves the Court to decline to exercise its jurisdiction over this cause and to dismiss same on the grounds of forum non conveniens.

In support of this motion, Defendant submits the attached Affidavit of Frederick P. Patton, which Affidavit is attached hereto and made a part hereof.

State of Illinois
County of Rock Island } ss

Affidavit of Frederick P. Patton

Frederick P. Patton, of lawful age, being first duly sworn, upon his oath states that prior to and on October 6, 1966, and at all times thereafter, he has been and now is an attorney for

the Defendant, Chicago, Rock Island and Pacific Railroad Company, and does make this Affidavit for and in behalf of the Defendant; that at his direction and under his supervision, an investigation was made of the facts pertaining to the issues of this case, and the facts herein set forth are based upon said investigation and are true to the best of affiant's knowledge and belief:

1. Plaintiff, at the time of the alleged accident and since said time, has continuously resided at Trenton, Michigan.

2. That Trenton, Michigan is over 427 miles from Rock Island, Illinois.

3. Plaintiff's attorneys prior to the filing of this Complaint were Harry Philo of Muskegon, Michigan and Lawyer, Lawyer, Ray and Crouch of Des Moines, Iowa.

4. The alleged cause of action involved in this law suit occurred in Boone, Iowa, which is located approximately 15 miles West of Des Moines, Iowa, and over 200 miles from Rock Island, Illinois.

5. The presence and testimony of at least twelve (12) witnesses who are residents of the State of Iowa will be essential to the defense of this cause of action. These witnesses are not subject to the service of subpoena of the Circuit Court of Rock Island County, Illinois.

6. The minimum loss of time for any witness attending the trial of this case in this Court will be four (4) days and the necessary expense for transportation, maintenance and loss of time of such witnesses as would voluntarily travel to Rock Island, Illinois, to testify on Defendant's behalf would aggregate a substantial sum of money.

7. The filing of this Complaint by the Plaintiff in this Court is vexatious and forum shopping as this case was previously set

down for trial in the United States District Court for the Southern District of Iowa and voluntarily dismissed by the Plaintiff on November 9, 1967, which was on the eve of the trial. Attached hereto is an Affidavit by B. A. Webster, Jr., attorney for the Defendant in Iowa regarding the facts concerning the dismissal of this cause on November 9, 1967.

8. That the dockets of the United States District Court for the Southern District of Iowa and for the Northern District of Iowa and the dockets of the State Courts, both in the City of Des Moines and in Dallas County, Iowa, are not crowded and that cases filed therein may be moved forward rapidly for trial.

9. There is no relevant connection between this cause of action and the Circuit Court of Rock Island County, Illinois.

10. That the jury in this cause would not have an opportunity of viewing the scene of the accident; whereas, a jury in Des Moines, Iowa, or in Dallas County, Iowa, would be afforded this privilege.

11. There are no facts to be proven by either party by witnesses residing in the State of Illinois.

Affidavit

State of Iowa
County of Polk

I, B. A. Webster, being first duly sworn, on oath depose and state that I am General Attorney for the Chicago, Rock Island and Pacific Railroad Company in the State of Iowa.

That on or about October 18, 1966 a Complaint was filed in the United States District Court for the Southern District of Iowa, Central Division, entitled Leva Adkins, Administratrix of the Estate of Everett Adkins, Deceased, Plaintiff v. Chicago,

Rock Island and Pacific Railroad Company, Defendant, being Civil Action No. 7-1905-C-1, which is the identical cause as now pending in this Court in Rock Island, Illinois.

That thereafter in said proceedings Interrogatories were filed by the plaintiff and were answered by the defendant. That numerous depositions were taken and all pre-trial proceedings were completed. That said case was set for trial in the United States District Court on December 5, 1967.

That prior to the date set for trial, defendant filed a Motion in Limine, a copy of which is attached hereto and by this reference made a part hereof. That at a pre-trial conference held before the Court immediately prior to trial all of the grounds of Defendant's Motion in Limine were sustained by the Honorable Roy L. Stephenson, United States District Judge for the Southern District of Iowa. That certain of said proceedings were reported by the Court Reporter, and a transcript may be made available.

I further state that the dockets of the United States District Court for the Southern District of Iowa and for the Northern District of Iowa are not crowded and that cases filed therein move forward rapidly for trial. I further state that the dockets of State Courts, both in the City of Des Moines and elsewhere in the State, are not crowded and that cases filed therein may be moved forward rapidly for trial.

Dated this 14th day of March, 1968.

(Defendants' Motion in Limine attached, not reproduced).

APPENDIX B

Extracts From Docket Entries, Circuit Court, Rock Island County, Illinois

"March 15, 1968 Motion to Dismiss filed by Defendant, together with Affidavits.

"April 1, 1968 Notice of hearing filed by Defendant, with Proof of Service.

"May 2, 1968 Notice of Hearing and Proof of Service filed by Defendant.

"May 9, 1968 Notice of Hearing filed by Plaintiff, together with Proof of Service.

"May 14, 1968 Hearing on Motions to Dismiss and hearing on Motion to Amend, continued generally, but to be heard within 15 days.

"May 14, 1968 Amended Complaint and Jury Demand filed by Plaintiff.

"July 30, 1968 Notice of Hearing filed by Defendant, together with Certificate of Service.

"August 1, 1968 Notice of Hearing filed by Plaintiff, with Proof of Service.

"August 8, 1968 Notice of Hearing filed by Plaintiff, with Proof of Service.

"August 12, 1968 Motion for Leave to Amend heard and granted nunc pro tunc May 14, 1968. Motion to Dismiss filed, 3/15/68 heard and denied (See Ord. DHM).

APPENDIX C

State of Illinois }
Supreme Court } ss

At a term of the Supreme Court, begun and held in Springfield on Monday, the fourteenth day of May in the year of our Lord, one thousand nine hundred and seventy-three, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice
Justice Walter V. Schaefer
Justice Daniel P. Ward
Justice Joseph Goldenhersh
Justice Thomas E. Kluczynski
Justice Charles H. Davis
Justice Howard C. Ryan
William J. Scott, Attorney General
Robert G. Miley, Marshal

Be It Remembered, that, to-wit: on the 4th day of June, 1973, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Chicago, Rock Island and Pacific Railroad Company; W. B. Throckmorton and R. V. Loftus,
Appellants,
No. 44876 vs.
Leva Adkins, Administratrix of the Estate of Everett Adkins, Deceased,
Appellee.

Appeal from Appellate Court, Third District.
69-135.
68-L-69.

And now, on this day, this case having been argued by counsel, and the Court, having diligently examined and in-

spected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgments aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgments of the Appellate Court of the Third District and the Circuit Court of Rock Island County in this behalf rendered Be Reversed, Annulled, Set Aside and Wholly for Nothing Esteemed and this cause be remanded to the Circuit Court of Rock Island County with directions to grant the motion to dismiss.

And it is further considered by the Court that the said appellants recover of and from the said appellee costs by them in this behalf expended to be taxed in due course of administration.

I, Justin Taft, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 10th day of October, 1973.

Signed: Justin Taft, Clerk
Supreme Court of the
State of Illinois

(Seal)

APPENDIX D

United States of America in the Federal Court for the Northern District of Illinois, Eastern Division

Leva Adkins, Administratrix of the Estate of Everett Adkins, Deceased, Plaintiff, vs. The Honorable Robert C. Underwood, The Honorable Walter V. Schaefer, The Honorable Daniel P. Ward, The Honorable Joseph H. Goldenhersh, The Honorable Thomas E. Kluczynski, The Honorable Howard C. Ryan, The Honorable Dan H. McNeal, The Honorable Charles Smith, Defendants.	No. 73 C 2558.

Stipulation

It is herewith Agreed by and between the parties in the above entitled cause that defendants have until Novmber 27, 1973 to answer the complaint or to plead otherwise. It is also Stipulated that in the meantime neither of the defendant Circuit Court judges in Rockford Illinois, will act in accordance with the Mandate of the Illinois Supreme Court issued in the case of Leva Adkins, Administratrix, v. Chicago, Rock Island and Pacific Railroad Company.

WILLIAM J. SCOTT
Attorney General of the State of Illinois
By FRED F. HERZOG
First Assistant Attorney General
of the State of Illinois
Attorney for Defendants
Room 1700
130 North Wells Street
Chicago, Illinois 60606
(312) 793-2457

PHILO, MAKI, COCKREL, ROBB,
SPEARMAN and COOPER
By HARRY M. PHILO
Attorneys for Plaintiff
Fourth Floor, 409 Griswold
Detroit, Michigan 48226
(313) 259-1330

Rec'd from AG 11/8/73

APPENDIX E

In the Circuit Court of the Fourteenth Judicial Circuit
Rock Island County, Illinois, General Division

Leva Adkins, Administratrix of the Estate of Everett Harmon Adkins, Deceased, Plaintiff, vs. Chicago, Rock Island and Pacific Railroad Company, R. V. Loftus and W. B. Throckmorton, Defendants.	No. 68 L 69

ORDER

(Filed in the Circuit Court of Rock Island County
General Division, January 13, 1976)

This cause coming on to be heard on the Motion of Defendant for a Judgment for costs, defendant appearing by its attorney, William M. Walker, and plaintiff by her attorney, Frank G. Schubert, and the court after having heard arguments of counsel and now being fully advised in the premises hereby Adjudges, Orders and Decrees:

That, pursuant to Mandate of Supreme Court dated October 10, 1973, judgment in favor of the Defendant, Chicago, Rock Island and Pacific Railroad Company be and is hereby entered

for costs in the amount of $2,645.80, together with interest at the rate of six percent (6%) from and after June 4, 1973.

Dated this 10th day of December, A.D., 1975.

Enter:

CHARLES J. SMITH
Judge

Approved as to form:

(Not Signed)
Attorney for Plaintiff

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75 979

LEVA ADKINS, ADMINISTRATRIX OF THE ESTATE OF EVERETT HARMON ADKINS, DECEASED,
PETITIONER,

-v-

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
RESPONDENTS.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

HARRY M. PHILO
Philo, Cockrel, Spearman, Cooper, Rine, King and Atkinson
409 Griswold, Fourth Floor
Detroit, Michigan 48226

VERNE LAWYER
427 Fleming Building
Des Moines, Iowa 50309

FRANK SCHUBERT
403 Safety Building
Rock Island, Illinois 61201

Attorneys for Petitioner

Johnson Reproduction Inc., 450 West Fort Street, Detroit, Michigan 48226
962-4020

SUBJECT INDEX

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THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS IN THE CASE AT BAR WAS NOT FILED OUT OF TIME AND THIS COURT IS FULLY VESTED WITH JURISDICTION TO HEAR AND DECIDE THE QUESTIONS PRESENTED 2

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 979

LEVA ADKINS, ADMINISTRATRIX OF THE ESTATE OF EVERETT HARMON ADKINS, DECEASED,
PETITIONER,

-v-

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
RESPONDENTS.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

To the Chief Justice and the Associate Justices of
the Supreme Court of the United States:

The Petitioner, Leva Adkins, Administratrix of the Estate of Everett Harmon Adkins, Deceased, respectfully prays that the Motion to Dismiss of the Respondents herein, dated February 9, 1976 be denied.

THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS IN THE CASE AT BAR WAS NOT FILED OUT OF TIME AND THIS COURT IS FULLY VESTED WITH JURISDICTION TO HEAR AND DECIDE THE QUESTIONS PRESENTED

This case encompasses a unique fact situation in that the Justices of the Supreme Court of Illinois, as Defendants in the collateral civil rights litigation, *Adkins v Honorable Robert C. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974), *affirmed*, 520 F. 2d 890 (7th Cir. 1975) *(per curiam), cert. denied*, No. 75-572 (December 8, 1975), expressly abstained from rendering final judgment in this case, in order to permit Petitioner, as Plaintiff in that case, the opportunity to seek injunctive relief restraining the entry of a final order and to seek enforcement of the Federal rights which she has asserted.

In *Market Street [illegible] Co. v Railroad Commission of California*, 324 U.S. 548, 551 (1945), Mr. Justice Jackson articulated this Court's test of finality as follows:

> Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Two circumstances are present in this case which compel the conclusion that the final order, from which the time period set forth in 28 USC § 2101 began to lapse, was the order entered on October 14, 1975 when measured against the *Market Street Rwy. Co.* test.

First, the specific action of the Supreme Court of Illinois was expressly intended to preclude the entry of final judgment. This was not the "latent power" inherent in any court to correct or modify its decisions and judgments, but an extraordinary step specifically taken by the Supreme Court of Illinois in this case and for the explicit purpose of "further review or correction" following conclusion of the *Adkins v Honorable Robert C. Underwood* litigation. Further, the Supreme Court of Illinois agreed to withhold entry of a final order so that Federal injunctive relief

would be effective, since once final judgment was entered, the issue before the United States District Court would have become moot and that Court would have been divested of its injunctive powers.

Second, that the order entered on October 14, 1975 was indeed the final order is indicated by the fact that Respondents did not, and could not, seek the entry of costs until that date. Thus, the provisions of Smith-Hurd Ill. Rev. Stat. Ann. Ch. 33, §7 (as amended, 1967) read in pertinent part as follows:

> If any person shall sue in any court of this state, in any action, wherein the plaintiff might have costs in case judgment be given for him, and he be non-pros'd, or suffer a discontinuance, or be non-suited after appearance of the defendant, or a verdict pass against him, then the defendant shall have judgment to recover his costs against the plaintiff (except against executors or administrators prosecuting in the right of their testator or intestate), to be taxed, and the same shall be recovered of the plaintiff, by like process as the plaintiff might have had against the defendant, in case judgment had been given for such plaintiff.

In Illinois, the right to costs does not become vested until final judgment has been pronounced. *Ambrosius v O'Farrell*, 161 Ill. App. 80, 82 (1912). And further, under Illinois practice, taxation of costs must occur within thirty days of the entry of judgment. Smith-Hurd Ill. Rev. Stat. Ann. Ch. 110, §68.1(3) (as amended, 1973) Cf. *Eugene Matanky & Associates, Inc. v Onixt*, 74 Ill. App. 2d 53, 219 N.E. 2d 865 (1966); *Kostbade v Telford*, 13 Ill. App. 3d 961, 301 N.E. 2d 321 (1973). Otherwise, the trial court loses jurisdiction of the case and cannot tax costs. *Ibid.*

In *Gospel Army v City of Los Angeles*, 331 U.S. 543, 548 (1946), Mr. Justice Rutledge emphasized in a unanimous decision of this Court:

> . . . the modern rule is that this Court will examine both the judgment and the opinion as well as other circumstances which may be pertinent . . . .

It is respectfully submitted that an examination of the other pertinent and extraordinary circumstances of this case requires the conclusion that the final order entered in this case was the order entered on October 14, 1975.

Moreover, it is respectfully, but strenuously, urged that the decision of the Supreme Court of Illinois to expressly reserve entry of final judgment until final adjudication of the collateral

civil rights litigation should be accorded great weight in the determination of the finality question raised by Respondents.

Finally, the questions presented are of such substantial calibre that any doubt created by this issue should be resolved in favor of the Petitioner.

RESPONDENTS HAVE MISSTATED THE EXTENT AND EFFECT OF THE PROCEEDINGS WHICH TRANSPIRED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA AND IN THE CIRCUIT COURT FOR ROCK ISLAND COUNTY

The Petition for Writ of Certiorari in this case raised four Federal questions: (a) attachment of prejudice by a State Court to a dismissal without prejudice entered by a U. S. District Court; (b) determination of the question of *forum non conveniens* adverse to Petitioner absent an opportunity to be heard; (c) denial of access to the State courts of Illinois to a citizen of the State of Michigan in order to sue two Illinois citizens who could not and would not be sued in any other jurisdiction; (d) determination that Petitioner's joinder of the two individually named Respondents was in "bad faith" absent a hearing and in the face of evidence upon which the jury, the trial court, and a unanimous intermediate appellate court concluded that there was liability.

With respect to the first of these, Respondents suggest that Petitioner is "twisting . . . the record" (Respondents' Motion to Dismiss, pp. 10-11) and that the counsel for the Respondent Railroad entered into the Stipulation for Dismissal pursuant to Rule 41(a) (1) of the Federal Rules of Civil Procedure only "to dispose of a half million dollar lawsuit . . . . " *(Id.)* This contention is belied by the very text of the Rule. Thus, the Rule provides in pertinent part:

> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

As Mr. Justice Goldenhersh pointed out in his dissent in this case, 54 Ill. 2d at 525, 301 N.E. 2d at 736:

> By this decision the majority, without any evidentiary basis, have made findings of fact with respect to plaintiff's good faith . . . and have decided not only that the trial court absued its discretion and that the appellate

> court erred, *but also that the Federal district judge somehow abused his discretion when he permitted plaintiff to dismiss her action without prejudice.* The record contains no basis to presume that the district judge was so lacking in perception as to fail to detect that plaintiff's motion for voluntary dismissal was filed for the "unseemly" purpose of taking "an appeal to the Illinois courts" from his rulings.
>
> [Emphasis added].

In addition, Rule 41(b) provides:

> (b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

If any part of the rationalle now advanced before this Court by Respondents' counsel existed in the United States District Court for the Southern District of Iowa, final disposition of this case would have been sought by them, then and there, pursuant to Rule 41(b), *supra*, with prejudice.

With respect to the second of these issues, the Respondents state "that there was in fact a hearing on the doctrine of *forum non conveniens* where counsel for both parties were represented." (Respondents' Motion to Dismiss, p. 10). In this case, *no hearing was ever held.* No evidence was introduced in support of Respondents' contention that the trial court should decline jurisdiction on the basis of *forum non conveniens;* no examination or cross-examination was had; and no opportunity for Petitioner to be heard was afforded. The trial court decided that the joinder of the two individually named Respondents *precluded the holding of a hearing.* The two individually named Respondents did not even raise the issue of *forum non conveniens* prior to verdict. At no time, was the Petitioner given the opportunity to contest the determination that Illinois was not a convenient forum for any of the Respondents. And in fact, it has been the contention of Petitioner throughout the pendency of these proceedings that Rock Island, Illinois, is the *most* convenient forum in which to present this case; and, at all times, Petitioner has been ready, willing, and able to present evidence to prove that Rock Island County, Illinois is the most convenient forum, *if she is afforded a hearing.*

In this light, Petitioner was not accorded minimum due process.

CONCLUSION

Petitioner respectfully prays that this Honorable Court shall enter an Order denying the Respondents' Motion to Dismiss and granting the Petition for Writ of Certiorari addressed to the Supreme Court of Illinois in the instant case.

Respectfully submitted,

HARRY M. PHILO
Philo, Cockrel, Spearman,
Cooper, Rine, King and
Atkinson
409 Griswold, Fourth Floor
Detroit, Michigan 48226

VERNE LAWYER
427 Fleming Building
Des Moines, Iowa 50309

FRANK SCHUBERT
403 Safety Building
Rock Island, Illinois 61201

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Memorandum in Opposition to Motion to Dismiss was served in triplicate upon counsel for Respondents herein, by posting copies of same in the United States Mail this 16th day of February, 1976 pursuant to Rule 33.1 of the Rules of the Supreme Court of the United States.

HARRY M. PHILO

APPENDIX

IN THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
GENERAL DIVISION

LEVA ADKINS, Administratrix of the Estate of EVERETT HARMON ADKINS, Dec. v. Plaintiff

CHICAGO, ROCK ISLAND & PAC. RAILROAD COMPANY, R. V. LOFTUS & W. B. THROCKMORTON Defendants

No. 68 L 69

NOTICE OF HEARING

TO: Frank G. Schubert, 403 Safety Bldg., Rock Island, IL
Harry M. Philo, 4th floor-409 Griswold, Detroit, Mich. 48226
Vern Lawyer, 4th floor-Fleming Bldg., Des Moines, Ia. 50309

On Monday, December 1, , 1975 , at 2:50 o'clock P. M. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Presiding Judge ~~or any Judge sitting in his stead,~~ in the court room usually occupied by him in Circuit Court General Division Rock Island County Courthouse, Rock Island, , Illinois.

then and there for hearing on defendant's, Chicago, Rock Island and Pacific Railroad Company, Motion for Judgment for Costs.

Name Coryn and Walker
Attorney for C.R.I.&P. R.R. Co.
Address 312 First Nat'l Bank Bldg.
City Rock Island, IL 61201
Telephone (309) 788-6301

Copy received , 19 , at , M.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
GENERAL DIVISION

LEVA ADKINS, Administratrix of the Estate of EVERETT HARMON ADKINS, Deceased,	)	
Plaintiff,	)	
vs.	)	
	)	NO. 68 L 69
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, R. V. LOFTUS and W. B. THROCKMORTON,	)	
Defendants.	)	

MOTION FOR JUDGMENT FOR COSTS

Comes now the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, by its attorneys, Coryn and Walker, and hereby moves this court to enter judgment for defendants and against plaintiff, the Estate of Everett Harmon Adkins, for costs incurred in this matter and as grounds therefore, states as follows:

1. That such a judgment for costs is in accordance with the mandate of the Supreme Court entered October 10, 1973, a copy of which mandate is attached hereto, marked Exhibit "A" and made a part hereof.

2. That the Clerk of the Supreme Court executed a statement of costs due in the way of a Bill of Costs in the sum of $2,645.80 a copy of which Bill of Costs is attached hereto, market Exhibit "B", and made a part hereof.

WHEREFORE, defendants pray that this court enter judgment for defendants in the sum of $2,645.80 together with interest at the rate of six percent (6%) from and after June 4, 1973, all in accordance with the mandate of the Supreme Court and the Bill of Costs.

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY, Defendant

By _____

For: Coryn and Walker,
Its Attorneys

CORYN AND WALKER
Attorneys for Chicago,
R.I. and Pacific R.R. Co.
312 First National Bank Bldg.
Rock Island, Illinois 61201
Phone: (309) 788-6301

United States of America

State of Illinois } ss.
Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the
May in the year of our Lord, one thousand nine hundred and
seventy-three, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE DANIEL P. WARD — JUSTICE CHARLES H. DAVIS
JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL
ROBERT G. MILLS, MARSHAL
ATTEST: JUSTIN TAFT, CLERK

BE IT REMEMBERED, that, to-wit: on the 4th day of June 1973, the
one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and
entered of record, to-wit:

Chicago, Rock Island and Pacific Railroad Company; W. B. Throckmorton; and R. V. Loftus,

Appellants

No. 44876 vs.

Neva Adkins, Administratrix of the Estate of Everett Adkins, Deceased,

Appellee

Appeal from
Appellate Court
Third District
69 - 335
68 - L - 69

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgments aforesaid, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgments of the Appellate Court of the Third District and the Circuit Court of Rock Island County

in this behalf rendered BE REVERSED ENTIRELY, SET ASIDE AND WHOLLY FOR NOUGHT HOLDEN, and this cause is remanded to the Circuit Court of Rock Island County with directions to grant the motion to dismiss.

And it is further considered by the Court that the said appellants recover of and from the said appellee costs by them in this behalf expended to be taxed, and have execution therefor in due course of administration

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 10th day of October, 1973.

EXHIBIT "A"

Clerk.

Form 19

Supreme Court of Illinois

BILL OF COSTS

JUSTIN TAFT, Clerk of Supreme Court,
Supreme Court Building
Springfield, Illinois

Chicago, Rock Island and Pacific Railroad Company; et al.,
Appellants

No. 44876 vs.

Leva Adkins, Admrx., etc.,
Appellee

Error to

Appeal from Appellate Court Third District

Petition for Leave to Appeal

Compensation

Transcript from Court below,	$	30.00
Appellate Court Record,		
Short Record,		
Abstract,		2,600.80
Additional Abstract,		
Publisher's Fee, (Notice of Non-Residence)		
Sheriff's Fees,		
Docket ~~Appearance~~ Fee paid by, Appellants		75.00
Total Amount of Costs, due from Appellee	$	2,645.80

I, JUSTIN TAFT, Clerk of the Supreme Court, do hereby certify the foregoing to be a correct statement of costs due from and unpaid by Appellee, in the above cause, as the same appears of record in my office.

Given under my hand and the Seal of the Supreme Court this 14th day of November A. D. 19 73.

To Klockau, McCarthy, Lousberg, Ellison & Rinden
Address 1808 Third Avenue
Rock Island, Ill. 61201

(S E A L)

/s/ Justin Taft,
Clerk,
Supreme Court of Illinois.

Attorney for Appellee.

14 (3547—M—11 68)

EXHIBIT "B"